DOCUMENT RESUME

ED 217 101 UD 022 255

TITLE	Affirmative Action in the 1980s: Dismantling the Process of Discrimination. Clearinghouse Publication 70.
INSTITUTION	Commission on Civil Rights, Washington, D.C.
PUB DATE	Nov 81
NOTE	62p.; Some footnotes may be marginally legible due to small type of original document.
EDRS PRICE	MF01/PC03 Plus Postage.
DESCRIPTORS	*Affirmative Action; *Civil Rights; *Civil Rights Legislation; Community Attitudes; *Court Litigation; Equal Education; Equal Opportunities (Jobs); Females; Housing Discrimination; Minority Groups; *Quotas; *Social Discrimination

ABSTRACT

This report explores the issue of affirmative action within the context of a problem-remedy approach, where affirmative action is regarded as a response to the problem of race, ethnic, and sex discrimination. Part A investigates discriminatory attitudes and behavior as practiced consciously or unconsciously by individuals, organizations, or whole social structures. Part B examines how civil rights law acknowledges the existence of various forms of discrimination against women and minorities; discusses how these laws provide remedies to counteract discrimination through affirmative action plans that use race, sex, and national origin as criteria in decision making; and explains how voluntary affirmative action can be taken without incurring legal liability. Part C distinguishes between the proper use and the abuse of affirmative action plans and measures that take race, sex, and national origin into account in determining quotas. The report emphasizes that particular measures used in affirmative action plans are responses to the nature and extent of discrimination that is demonstrated to exist in a particular situation, rather than isolated practices intended to benefit certain groups. The appendix presents guidelines for implementing effective affirmative action plans in employment using the problem-remedy approach. (Author/MJL)

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Affirmative Action in the 1980s: Dismantling the Process of Discrimination

A Statement
of the United States Commission on Civil Rights

Clearinghouse Publication 70
November 1981

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- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, handicap, or national origin, or by reason of fraudulent practices;
- Study and collect information concerning legal developments constituting discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Appraise Federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin;
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ACKNOWLEDGEMENTS

The Commission is indebted to Jack P. Hartog, Assistant General Counsel and director of this project, who along with staff attorneys Letvia Arza-Goderich, Reager Marlana Goodson, Anne Meadows, Manuel Romero,* Stephen O'Rourke, and Derryl D. Stewart, and Mark Darrell,* law clerk, wrote this statement.

The Commission is especially grateful to Sheila Bienenfeld for her special assistance in researching and drafting part A and the appendix of this statement, preparing consultations on its proposed version, and commenting on the entire statement.

Appreciation is also extended to Michele Moree, DeBorah Marks, and Lorraine Jackson for their support and assistance in the production of this statement, and to Bonnie Mathews and Carol-Lee Hurley for their editorial assistance and to Vivian Hauser, Audree Holton, and Vivian Washington for their support in the final preparation for publication of this statement.

Eileen Stein, General Counsel,* had overall supervisory responsibility for the initial phases of this project. Its final phase was under the overall supervision of Paul Alexander, Acting General Counsel.

* No longer a member of Commission staff.

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PREFACE

This report, the result of 2 years of work, draws extensively on past Commission publications and consolidates much existing civil rights law and policy. During 1980 the Commission drafted a proposed statement on affirmative action, which also was called *Affirmative Action in the 1980s: Dismantling the Process of Discrimination.* It was released for public comment in January 1981. Shortly thereafter the Commission sponsored a series of consultations at which lawyers, government officials, social scientists, and management and labor representatives presented written and oral comments on the proposed statement. Experts also gave their views on the practical aspects of implementing affirmative action plans. These proceedings will be published as *Consultations on the Affirmative Action Statement of the U.S. Commission on Civil Rights.* Based on this information and our ongoing review, the Commission has revised the proposed statement. We also have added an appendix that offers specific guidelines for designing, implementing, and evaluating affirmative action plans in employment.

Introduction

Affirmative Action in the 1980s: Dismantling the Process of Discrimination applies a unifying "problem-remedy" approach to affirmative action. The statement's objective is to provide useful guidance to those in business, labor, education, government, and elsewhere who must carry out national civil rights law and policy.

These decisionmakers are often perplexed by a number of thorny issues. How can one consider race, sex, or national origin in order to eliminate considerations of race, sex, and national origin? Under what conditions should particular kinds of affirmative action be used? What is the difference between "goals" and "quotas"? How should the interests of white males be considered in affirmative action plans? Which groups should affirmative action plans include and for what reasons? How long should affirmative action plans continue?

Affirmative Action in the 1980s: Dismantling the Process of Discrimination argues that the answers to these and other important questions emerge from a more precise understanding of the dynamics of discrimination. Just as medical treatment is based on a diagnosis, affirmative action is based on the nature and extent of race, sex, and national origin discrimination. Affirmative action has no meaning outside the context of discrimination, the problem it was created to remedy.

All too often, discussions of affirmative action first divorce this remedy from the historic and continuing problem of discrimination against minorities and women. Such discussions then debate the merits of particular measures that take race, sex, and national origin into account—such as goals and quotas—without any agreement upon or consistent reference to the discriminatory conditions that can make such remedies necessary. This statement seeks to avoid this pitfall. It continually ties the remedy of affirmative action to the problem of discrimination with a "problem-remedy" approach. Without agreement about the forms and scope of race, sex, and national origin discrimination, agreement about appropriate remedies is difficult, if not impossible. Our starting point, therefore, is not affirmative action, but race, sex, and national origin discrimination.[1]

[1] This statement does not address the very significant but still developing areas of civil rights dealing with discrimination on the basis of age and handicap. Age discrimination was forbidden in the Age Discrimination Act of 1975, 42 U.S.C. §§6101–07 (1976 & Supp. III 1979), and the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§621–34 (Supp. III 1979). *See generally,* U.S., Commission on Civil Rights, *The Age Discrimination Study* (1977), and *The Age Discrimination Study, Part II* (1979). Discrimination against the handicapped was prohibited in the Architectural Barriers Act of 1968, as amended, 42 U.S.C. §§4151–57 (1976); and in Title V of the Rehabilitation Act of 1973, as amended, 29 U.S.C.A. §§791–94c (1974 & Supp. 1976–80 & Supp. No. 4 1981). Title V of the Rehabilitation Act requires that each department, agency, and instrumentality of the executive branch implement an affirmative action program plan for the hiring, placement, and advancement of the handicapped. 29 U.S.C.A. §791(b) (1974 & Supp. 1976–80 & Supp. No. 4 1981). Federal contractors are also required to take affirmative action to employ and advance the handicapped. 29 U.S.C.A. §793 (1974 & Supp. 1976–80 & Supp. No. 4 1981).
Similarly, this statement does not discuss the problem of religious discrimination, as prohibited by the first amendment (U.S. Const. amend. I) and various Federal statutes, such as Title VII of the 1964 Civil Rights Act (42 U.S.C. §§2000e to 2000e–17 (1976 and Supp. III 1979)). The Commission will issue a statement on religious discrimination in 1982.

As the title of this statement suggests, the Commission views discrimination against minorities and women as processes that will continue unless systematically dismantled. Today's discriminatory processes originated in our history of inequality, which was based on philosophies of white and male supremacy. These processes became self-sustaining as the prejudiced attitudes and behaviors of individuals were built into the operations of organizations and their supporting social structures (such as education, employment, housing, and government). These built-in mechanisms reinforce existing discrimination and breed new unfair practices or damaging stereotypes. Such discrimination then perpetuates the inequalities that set the processes in motion in the first place. Part A of this statement, "The Problem: Discrimination," explains how these attitudes and actions combine at the individual, organizational, and structural levels. Although the resulting patterns may not be overtly racist, sexist, or bigoted, they subordinate, exclude, segregate, and deny equal opportunity almost as effectively as overt discrimination does.

Both conscious and unconscious forms of prejudice can propel discriminatory processes. But discrimination is more than individual expressions of bias based on irrational ideas of racial, ethnic, or gender superiority.[2] When discrimination is widespread and entrenched, it becomes a self-regenerating process capable of converting what appear to be neutral acts into further discrimination. Part A lists many examples of such activities, ranging from the simple, such as word-of-mouth recruiting, to the complex, such as the interaction of education, employment, and housing discrimination. These activities, separately and together, routinely confer privileges and advantages upon the dominant group, while imposing penalties and disadvantages upon minorities and women.

When these processes are at work, antidiscrimination remedies that insist on "color blindness" or "gender neutrality" are insufficient. Such efforts may control certain prejudiced conduct, but measures that take no conscious account of race, sex, or national origin often prove ineffective against processes that transform "neutrality" into discrimination. In such circumstances, the only effective remedy is affirmative action, which responds to discrimination as a self-sustaining processs and dismantles it.

Affirmative action has repeatedly survived litigation challenging its constitutionality and compatibility with civil rights law. Civil rights cases have now settled the basic issue of whether affirmative action is lawful, often implicitly taking a problem-remedy approach. Part B, "Civil Rights Law and Affirmative Action," discusses how the focus of civil rights law has moved to the more sophisticated and productive issues of which antidiscrimination measures may be used under what circumstances to remedy what forms of discrimination.

Perhaps the most misunderstood aspect of civil rights laws and affirmative action plans is their reliance on numerical data for proving the existence of race, sex, and national origin discrimination. That reliance is grounded on the common sense proposition that the underrepresentation of minorities and women in any area of economic or professional enterprise is an indication that discrimination may exist. As the Supreme Court of the United States has noted in the context of employment, statistics showing racial and ethnic imbalance are important:

> because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.[3]

Apparently rational arguments can mask discriminatory behavior, and even neutral efforts can unintentionally cause discriminatory results. In such circumstances, the best available means for detecting the possible presence of discriminatory processes is to examine their statistical outcomes.

Statistical evidence of underrepresentation of minorities and women, however, only pinpoints those areas where discrimination may be occurring. Those areas must then be analyzed to determine if discriminatory processes are at work, how they work, and how best they can be dismantled. Thus, numerical data are *quantitative* signs that discrimination may be present or absent. They do not identify or explain

[2] As late as the mid-1960s, "employment discrimination tended to be viewed as a series of isolated and distinguishable events due, for the most part, to the ill-will on the part of some identifiable individual or organization. . . .Employment discrimination, as we know today, is a far more complex and pervasive phenomenon." H.R. Rep. No. 92-238, 92d Cong., 1st sess., *reprinted in* (1972) U.S. Code Cong. & Ad. News 2143-44.

[3] International Bhd. of Teamsters v. United States, 431 U.S. 324, 340 n.20 (1977). The same principle has been applied in sex discrimination cases. Dothard v. Rawlinson, 433 U.S. 321 (1977).

the *qualitative* behaviors, motivations, and patterns that cause those results. Both the quantitative and qualitative aspects of discrimination must be considered in diagnosing the nature and extent of the problem, in devising affirmative action plans to remedy the discrimination, and in evaluating their success.

How best to *enforce* civil rights laws to assure the use of quantitative and qualitative techniques in affirmative action plans is not the subject of this statement. The Commission frequently examines the effectiveness of Federal enforcement procedures that compel compliance with civil rights laws, such as reporting requirements, standards for invoking sanctions, and training of enforcement personnel.[4] Plagued by a history of poor administration, many Federal civil rights enforcement programs are perceived as inconsistent, duplicative, and ineffectual. The resulting misunderstanding of affirmative action has contributed to widespread resistance.[5] This statement will not address how these procedures can be improved. Its emphasis is on the more fundamental issues of why affirmative action is an indispensable part of civil rights law and how all organizations within our country can voluntarily advance civil rights principles through affirmative action.

Accordingly, this statement does not distinguish between the *illegal* discrimination for which civil rights laws *require* remedies and the *legal* discrimination for which they *encourage* remedies. Discrimination against minorities and women may be simple and obvious, making legal responsibility and blame easy to assess. It also may be complex and difficult to detect, so that no individual is legally accountable or morally blameworthy. Civil rights law disapproves of all discriminatory acts, while actually prohibiting only some of them. Enforcement agencies and the courts must devote their energies to distinguishing between legal and illegal acts because they can only order action on the basis of a violation of law. Those subject to enforcement action, however, may remedy all expressions of discrimination. Their affirmative action plans are not limited to remedying illegal discrimination. Such plans change the practices and conditions that promote discrimination; they need not search only for unlawful acts and their victims.

By affirmative action, the Commission means active efforts that take race, sex, and national origin into account for the purpose of remedying discrimination.[6] Part C, "The Remedy: Affirmative Action," further refines this general concept by differentiating between affirmative action plans and the specific measures that commonly are part of such plans. An affirmative action plan is a systematic, comprehensive, and reviewable effort to dismantle discriminatory processes. Measures that implicitly or explicitly use race, sex, and national origin as criteria in decisionmaking may be implemented through or apart from an affirmative action plan. This distinction—between affirmative action plans and measures that take race, sex, and national origin into account—is crucial for productive discussion of affirmative action. Deliberate antidiscrimination strategies in the form of affirmative action plans are necessary whenever discrimination, like a river's current, sweeps along with it everything that does not consciously work against it. Reasonable people may disagree, however, on the wisdom of particular measures that take race, sex, and national origin into account in given contexts to counter that current.

Based on this analysis, Part C tackles the difficult questions listed at the beginning of this introduction. With respect to quotas, for example, the Commission restates its vigorous opposition to systems whose purpose is to exclude identifiable groups from opportunities.[7] These quotas derive from prejudice, existing to stigmatize those they deliberately keep out. They only superficially resemble the quotas,

[4] *See,e.g.*, U.S., Commission on Civil Rights, *Federal Civil Rights Enforcement Effort* (of 1970) (1971); *The Federal Civil Rights Enforcement Effort Seven Months Later* (1971); *The Federal Civil Rights Enforcement Effort: One Year Later* (1971); *The Federal Civil Rights Enforcement Effort—A Reassessment* (1973); *The Federal Civil Rights Enforcement Effort* (1974); *The Federal Civil Rights Enforcement Effort—1977—To Eliminate Employment Discrimination: A Sequel* (1977); *The Federal Fair Housing Enforcement Effort* (1979).

[5] *See,e.g.*, Report of 13 State Advisory Committees to the U.S. Commission on Civil Rights, *Promises and Perceptions: Federal Efforts to Eliminate Employment Discrimination Through Affirmative Action* (1981).

[6] The Commission, in a previous statement on affirmative action, accurately described it as "a term that in a broad sense encompasses any measure, beyond simple termination of a discriminatory practice, adopted to correct or compensate for past or present discrimination or to prevent discrimination from recurring in the future." U.S., Commission on Civil Rights, *Statement on Affirmative Action* (1977), p. 2. Building on our earlier statement, this new statement addresses the underlying rationale for and provides a process-oriented approach to affirmative action.

[7] U.S., Commission on Civil Rights, *Toward Equal Educational Opportunity: Affirmative Admissions Programs at Law and Medical Schools* (1978); *Statement on Affirmative Action* (1977); *Statement on Affirmative Action for Equal Employment Opportunities* (1973).

approved by civil rights law, that select qualified minorities and women according to designated ratios or percentages for limited periods of time for the purpose of overcoming prejudice and its effects. This statement sharply distinguishes such quotas from numerical goals, which are methods affirmative action plans use to judge the overall effectiveness of the various measures the plans implement. Part C endorses quotas—as have the courts, Federal agencies, and Congress—when quotas are needed to make equal opportunity a reality for members of historically excluded groups. The problem-remedy approach recognizes that because of the duration, intensity, scope, and intransigence of the discrimination women and minority groups experience, affirmative action plans are needed to assure equal opportunity. The particular measures used within those plans, including quotas, depend on the nature and extent of the discriminatory problem that is encountered.

The appendix presents concrete and practical ideas for applying the problem-remedy approach to dismantling the processes of employment discrimination. This appendix offers no magic formulas for creating and carrying out successful affirmative action plans. It does provide general guidelines for all organizations that desire to use affirmative action effectively to remedy employment discrimination.

During the last decade, all three branches of government advanced the concept and practice of affirmative action. Republican and Democratic administrations alike adopted and enforced guidelines and regulations calling for various forms of affirmative action. Congress passed legislation mandating affirmative action and defeated attempts to prohibit its use. The courts, on the basis of facts compiled in adversary proceedings, ruled that civil rights laws require affirmative action in some circumstances and encourage it in others.

The present administration is reexamining this record of government support for affirmative action. For example, Labor Department officials have proposed and are contemplating more significant changes in regulations enforcing Executive Order 11246,[8] a long-standing Presidential directive requiring those who contract with the Federal Government to agree to take affirmative action. A select Presidential review committee is considering substantial revisions in an interagency agreement that sets a uniform government position on discriminatory employee selection procedures.[9] The Department of Justice has decided not to follow the pattern of previous administrations that had negotiated specific goals and timetables in settling complaints of illegal discrimination.[10] Key leaders in the administration have spoken on the civil rights perspective underlying these actions.[11] Their speeches enunciate positions inconsistent with the principles of established civil rights law and policy explained in this statement.

It is these principles, the conceptual framework for civil rights activities, that are the subject of this statement. The Commission will analyze separately any new executive positions and congressional activity[12] in this area. As part of our statutory responsibility to study developments in civil rights laws and to appraise Federal civil rights enforcement efforts, the Commission will comment on administrative actions, deliver congressional testimony, and issue publications. This statement has a more limited

[8] The Office of Federal Contract Compliance Programs, a unit in the Department of Labor that enforces Executive Order 11246, has proposed changing current regulations (46 Fed. Reg. 42968 (Aug. 25, 1981)) and has requested public comments in four areas where it is considering making additional changes (46 Fed. Reg. 36213 (July 14, 1981)).

[9] President Ronald Reagan created the Presidential Task Force on Regulatory Relief to review numerous Federal regulations that it considers "unnecessary" or "burdensome." Exec. Order No. 12291, 46 Fed. Reg. 13193 (Feb. 19, 1981). As of October 1981, this task force, under the direction of Vice President George Bush, was reviewing, among other regulations, the Uniform Guidelines on Employee Selection Procedures (29 C.F.R. Part 1607 (1980)). See Office of the Press Secretary of the Vice President of the United States, "Existing Paperwork Requirements to Be Reviewed," press release, Aug. 12, 1981.

[10] *See,e.g.*, United States v. New Hampshire, No. C81-457-0 (D.N.H. Sept. 17, 1981) (consent decree), which is an agreement between the United States and the State of New Hampshire settling allegations, filed earlier by the Justice Department, that the State police had engaged in sex discrimination.

[11] *See,e.g.*, William French Smith, Attorney General of the United States, speech delivered before the American Law Institute, Philadelphia, Pa., May 22, 1981; William Bradford Reynolds, Assistant Attorney General, Civil Rights Division, testimony on affirmative action and equal employment opportunity enforcement before the House Subcommittee on Employment Opportunities, Sept. 23, 1981.

[12] The Senate Subcommittee on the Constitution, chaired by Sen. Orrin Hatch (R-Ut.), held hearings on affirmative action in 1981. U.S., Congress, Senate, Subcommittee on the Constitution, Hearings, "Affirmative Action," 97th Cong., 1st sess., 1981. The House Subcommittee on Employment Opportunities, chaired by Rep. Augustus Hawkins (D-Calif.), has also held hearings on affirmative action. U.S, Congress, House, Subcommittee on Employment Opportunities, Hearings, "Affirmative Action: EEO Oversight Hearings," 97th Cong., 1st sess., 1981. As this statement goes to press, the records of these hearings have not been issued.

purpose. It is designed to provide conceptual direction and guidance to ongoing and future affirmative action efforts and to answer the hard questions raised by critics.

Arguments against affirmative action have come from the top ranks of academia and the most powerful sectors of our economy. They are supported by a large segment of the American public. Some of these critics have a long history of commitment to civil rights progress. They often oppose affirmative action by citing the very principles affirmative action claims to advance. The Commission has read their views in legal briefs, scholarly literature, political debates, and the popular press and has heard from some of their ablest voices at our consultations.[13] Their arguments are diverse. They range from vigorous assertions that all race-conscious remedial measures are no different from the racism they seek to remedy to positions that draw the line only at rigid quotas imposed without judicial findings of discrimination. Some affirmative action opponents criticize any use of race, sex, and national origin statistics, contending that they inevitably produce selection systems that distribute resources and opportunities according to one's group membership rather than merit. Others accept statistical techniques, while faulting enforcement officials whose exclusive reliance on numerical remedies for discrimination is said to give preferential treatment to unqualified or less qualified minorities and women. In general, those opposed to affirmative action portray it as violating the rights of individual white men in order to remedy group disadvantages of women and certain "preferred" minorities.

The Commission disagrees with the perception of race, sex, and national origin discrimination that underlies nearly all such views. The arguments against affirmative action would be persuasive only if the critics' inaccurate assessment of discrimination were accepted. Only if discrimination were nothing more than the misguided acts of a few prejudiced individuals would affirmative action plans be "reverse discrimination." Only if today's society were operating fairly toward minorities and women would measures that take race, sex, and national origin into account be "preferential treatment." Only if discrimination were securely placed in a well-distanced past would affirmative action be an unneeded and drastic remedy.

Overwhelming evidence contradicts the critics' perceptions. Race, sex, and national origin discrimination are not relics of the past existing solely as isolated acts of prejudice in an almost colorblind and gender-neutral society. The discrimination that minorities and women experience is far more pervasive, entrenched, and varied than many of the critics of affirmative action assume. Such discrimination will not yield to remedies that are premised on ignoring its existence.

Both sides of the national debate over affirmative action share a common vision of the future: a society in which race, sex, and national origin are simply differences among people and not indications of superiority or inferiority, domination or subordination. Reasonable people may differ on the best means for achieving such a nondiscriminatory future, but that disagreement will be more productive and less polarized if we seek a common understanding of the discrimination that prevents the dream from becoming a reality.

[13] These proceedings are being published as *Consultations on the Affirmative Action Statement of the U.S. Commission on Civil Rights.*

Part A

The Problem: Discrimination

Making choices is an essential part of everyday life for individuals and organizations. These choices are shaped in part by social structures that set standards and influence conduct in such areas as education, employment, housing, and government. When these choices limit the opportunities available to people because of their race, sex, or national origin, the problem of discrimination arises.

Historically, discrimination against minorities and women was not only accepted, but was also governmentally required. The doctrine of white supremacy, used to support the institution of slavery, was so much a part of American custom and policy that the Supreme Court of the United States in 1857 approvingly concluded that both the North and the South regarded slaves "as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect."[1] White supremacy survived the passage of the Civil War amendments to the Constitution and continued to dominate legal and social institutions in the North as well as the South to disadvantage not only blacks,[2] but other racial and ethnic groups as well—American Indians, Alaskan Natives, Asian and Pacific Islanders, and Hispanics.[3]

While minorities were suffering from white supremacy, women were suffering from male supremacy. Mr. Justice Brennan has summed up the legal disabilities imposed on women this way:

> [T]hroughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children.[4]

In 1873 a member of the Supreme Court proclaimed: "Man is, or should be, woman's protector and defender. The natural and proper timidity and

[1] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 408 (1857).

[2] For a concise summary of this history that refers to numerous other sources, see U.S., Commission on Civil Rights, *Civil Rights: A National, Not a Special Interest* (1981), pp. 1–33; *Twenty Years After Brown* (1975), pp. 4–29; *Freedom to the Free: Century of Emancipation 1863–1963* (1963).

[3] The discriminatory conditions experienced by these minority groups have been documented in the following publications by the U.S. Commission on Civil Rights: *Indian Tribes: A Continuing Quest for Survival* (1981); *The Navajo Nation: An American Colony* (1975); *The Southwest Indian Report* (1973); *Success of Asian Americans: Fact or Fiction?* (1980); *The Forgotten Minority: Asian Americans in New York City* (New York State Advisory Committee, 1977); *Stranger in One's Land* (1970); *Toward Quality Education for Mexican Americans* (1974); *Puerto Ricans in the Continental United States: An Uncertain Future* (1976).

[4] Frontiero v. Richardson, 411 U.S. 677, 685 (1973), *citing* Leo Kanowitz, *Women and the Law: The Unfinished Revolution* (Albuquerque: University of New Mexico Press, 1969), pp. 5–6, and Gunnar Myrdal, *An American Dilemma* (20th Anniversary ed., 1962), p. 1073. Justice Brennan wrote the opinion of the Court, joined by Justices Douglas, White, and Marshall. Justice Stewart concurred in the judgment. Justice Powell, joined by Chief Justice Burger and Justice Blackmun, wrote a separate concurring opinion. Justice Rehnquist dissented. See also H.M. Hacker, "Women as a Minority Group," *Social Forces*, vol. 30 (1951), pp. 60–69; W. Chafe, *Women and Equality: Changing Patterns in American Culture* (New York: Oxford University Press, 1977).

delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life."[5] Such romantic paternalism has alternated with fixed notions of male superiority to deny women in law and in practice the most fundamental of rights, including the right to vote, which was not granted until 1920;[6] the Equal Rights Amendment has yet to be ratified.[7]

Although beliefs and practices based on white and male supremacy linger, public attitudes toward civil rights have improved noticeably.[8] The blatant racial and sexual discrimination that originated in our often forgotten past, however, continues to affect the present. A steady flow of data reveals persistent and widespread gaps throughout society between the status of white males and various minority groups and women.[9] Because they occur so often and in so

[5] Bradwell v. State, 83 U.S. (16 Wall) 130, 141 (1873) (Bradley, J., concurring), *quoted in* Frontiero v. Richardson, 411 U.S 677, 684 (1973).

[6] U.S., Const. amend. XIX.

[7] See U.S., Commission on Civil Rights, *The Equal Rights Amendment: Guaranteeing Equal Rights for Women Under the Constitution* (1981); *Statement on the Equal Rights Amendment* (1978).

[8] Public opinion polls reveal that the expression of prejudiced attitudes toward blacks and women have continued to decline, particularly in the last decade, although such prejudice persists in a significant percentage of the public. A 1978 Gallup poll showed a decline in the expression of prejudice in issues related to housing and politics. Between 1965 and 1978, the number of whites who said they would move out of their neighborhoods if blacks moved in declined from 35 percent to 16 percent. Between 1969 and 1978, the number of whites who said they would vote for a qualified black Presidential candidate of their own party increased from 67 to 77 percent. *Gallup Poll,* Aug. 27, 1978. Another poll found that betweeen 1971 and 1978 a declining number of whites said they believed blacks to be inferior (from 22 percent to 15 percent) or of less native intelligence than whites (from 37 percent to 25 percent). Poll by Louis Harris and Associates for the National Conference on Christians and Jews, *Newsweek,* Feb. 26, 1979, p. 48.
Although blacks continue to see racial prejudice as an important cause of many of their social and economic problems, whites are now less often seen as standing in the way of black progress compared to a decade ago. In 1969 a *Newsweek* poll found a plurality of blacks (46 percent) feeling that most whites wanted to keep them down. The February 1981 *Newsweek* poll showed fewer (32 percent) supporting this view. *Gallup Poll Watch,* May 18, 1981.
With regard to women, the findings are ambiguous. A recent Gallup poll shows public support for the Equal Rights Amendment at a new high with 63 percent of Americans who have heard or read about the ERA favoring it and 32 percent opposed. In surveys conducted regularly by the Gallup Poll since 1975, support for the ERA had never exceeded 58 percent. *Gallup Poll,* Aug. 9, 1981. Another poll conducted by the Roper Organization showed a decline in support for the ERA (from 55 percent of women and 68 percent of men in 1975 to 51 percent of women and 52 percent of men in 1980). However, the same poll indicated that support for efforts to strengthen the status of women had increased (from 40 percent of women and 44 percent of men in 1970 to 60 percent of women and 64 percent of men in 1980). *Virginia Slims American Women's Opinion Poll* (Roper Organization, 1980).

[9] The Commission has issued a report evaluating the Nation's progress toward equality by systematically comparing the social conditions of the minority and female population to those of the white male population, *Social Indicators of Equality for Minorities and Women* (1978). Separately analyzed by sex were statistics on American Indians and Alaskan Natives, blacks, Mexican Americans, Japanese Americans, Chinese Americans, Filipino Americans, Puerto Ricans, and the majority population. According to the report, minorities and women are less likely to have completed as many years of high school or have a high school or college education than white males. If not undereducated, they tend to be educationally overqualified for the work they do and earn less than comparably educated white males. As of 1976, among those persons 25–29 years of age, 34 of every 100 white males were college educated, while only 11 out of every 100 minorities were college educated. Ibid., p. 26.
Women and minorities are more likely to be unemployed, to have less prestigious occupations than white men, and to be concentrated in different occupations. From 1970 to 1976, when unemployment rates were rising for all groups, the disparity between minority and female rates and the majority male rate generally increased; blacks, Mexican Americans, and Puerto Ricans of both sexes moved from having approximately twice the unemployment of majority males in 1970 to nearly three times the majority male rate in 1976. Ibid., p. 29. In 1976, 47.8 percent of black male teenagers, 51.5 percent of black female teenagers, and 55.2 percent of Puerto Rican male teenagers were unemployed, compared to 15.0 percent unemployment among majority male teenagers. Ibid., p. 32. Occupational segregation is also intense: One-third of the jobs held by minority men and two-thirds to three-fourths of the jobs held by women in 1976 would have to be changed to match the occupational patterns of white males. Ibid., p. 45.
Minorities and women have less per capita household income and a greater likelihood of being in poverty. "The indicator values for median household per capita income for 1959, 1969, and 1975 show that most minority and female-headed households have only half the income that is available to majority households." Ibid., p. 65. Relative to the income of white males, the incomes available to Mexican Americans and Puerto Ricans in 1975 were the same as or less than they were in 1965 and 1970. In addition, minority-headed families, regardless of the sex of the family head, are twice as likely to be in poverty as majority-headed families, and minority female-headed families are over five times as likely to be in poverty as majority-headed families. Ibid., pp. 65–66.
Finally, minority and female-headed households are more likely to be located in central cities than in the suburbs where majority-headed households are located. Between 1960 and 1970 most minority households were only about one-half to two-thirds as likely as white households to be situated outside a central city. Minorities and women are less likely to be homeowners, more likely to live in overcrowded conditions, and more likely to spend more than a quarter of their family income on rent. American Indian, Alaskan Native, black, Chinese American, Filipino American, and Puerto Rican rental households were all more than two, with Mexican American households almost six, times as likely to be overcrowded as white households in 1970. In 1976 minority and female-headed households were, at best, two-thirds as likely to be owner occupied as majority-headed households. Ibid., pp. 75, 84–85.

many places, such statistically observable inequalities are strong evidence of a systematic denial of equal opportunities. Those inequalities result from a complex interaction of attitudes and actions of individuals, organizations, and the network of social structures that makes up our society.

Individual Discrimination

The most common understanding of discrimination rests at the level of prejudiced individual attitudes and behavior. Although open and intentional prejudice persists, individual discriminatory conduct is often hidden and sometimes unintentional.[10] Some of the following are examples of deliberately discriminatory actions by consciously prejudiced individuals. Some are examples of unintentionally discriminatory actions taken by persons who may not believe themselves to be prejudiced, but whose decisions continue to be guided by deeply ingrained discriminatory customs.

- Personnel officers whose stereotyped beliefs about women and minorities justify hiring them for low level and low paying jobs exclusively, regardless of their potential experience or qualifications for higher level jobs.[11]
- Hiring officials, historically white males, who rely on "word-of-mouth" recruiting among their friends and colleagues, so that only their friends and proteges of the same race and sex learn of potential job openings.[12]
- Employers who hire women for their sexual attractiveness or potential sexual availability rather than their competence, and employers who engage in sexual harassment of their female employees.[13]
- Teachers who interpret linguistic and cultural differences as indications of low potential or lack of academic interest on the part of minority students.[14]
- Guidance counselors and teachers whose low expectations lead them to advise female and minority students to avoid "hard" courses, such as mathematics and science, and to take courses that do not prepare them for higher paying jobs.[15]
- Real estate agents who show fewer homes to minority buyers and steer them to minority or mixed neighborhoods because they believe white residents would oppose the presence of black neighbors.[16]
- Families who assume that property values inevitably decrease when minorities move in and

[10] *See, e.g.*, R.K. Merton, "Discrimination and the American Creed," in R.K. Merton, *Sociological Ambivalence and Other Essays* (New York: The Free Press, 1976), pp. 189–216. In this essay on racism, published for the first time more than 30 years ago, Merton presented a typology which introduced the idea that discriminatory actions are not always directly related to individual attitudes of prejudice. Merton's typology consisted of the following: Type I—the unprejudiced nondiscriminator; Type II—the unprejudiced discriminator; Type III—the prejudiced nondiscriminator; Type IV—the prejudiced discriminator. In the present context, Type II is crucial in its observation that discrimination is often practiced by persons who are not themselves prejudiced, but who respond to, or do not oppose, the actions of those who discriminate because of prejudiced attitudes (Type IV). See also D.C. Reitzes, "Prejudice and Discrimination: A Study in Contradictions," in *Racial and Ethnic Relations*, ed. H.M. Hughes (Boston: Allyn and Bacon, 1970), pp. 56–65.

[11] *See* R.M. Kanter and B.A. Stein, "Making a Life at the Bottom," in *Life in Organizations, Workplaces as People Experience Them*, ed. R.M. Kanter and B.A. Stein (New York: Basic Books, 1976), pp. 176–90; also, L.K. Howe, "Retail Sales Worker," ibid., pp. 248–51; also, R.M. Kanter, *Men and Women of the Corporation* (New York: Basic Books, 1977).

[12] *See* M.S. Granovetter, *Getting A Job: A Study of Contract and Careers* (Cambridge: Harvard University Press, 1974), pp. 6–11; also, A.W. Blumrosen, *Black Employment and the Law* (New Brunswick, N.J.: Rutgers University Press, 1971), pp. 232–34. *See also* EEOC v. Detroit Edison Co., 515 F.2d 301, 313 (6th Cir. 1975), *vacated on other grounds*, 431 U.S. 951 (1977) (practice of relying on referrals by a predominantly white work force rather than seeking out new employees in the marketplace for jobs was found to be discriminatory); EEOC v. Ford Motor Co., 645 F.2d 183, 198 (4th Cir. 1981) (a policy of favoring job applicants who were friends of current workers, where current work force was exclusively male, plus statistical data showing bias in hiring practices, established discrimination under Title VII).

[13] *See* U.S., Equal Employment Opportunity Commission (EEOC), "Guideliness on Discrimination Because of Sex," 29 C.F.R. §1604.4 (1979); L. Farley, *Sexual Shakedown: The Sexual Harassment of Women on the Job* (New York: McGraw Hill, 1978), pp. 92–96, 176–79; C.A. Mackinnon, *Sexual Harassment of Working Women* (New Haven: Yale University Press, 1979), pp. 25–55.

[14] *See* R. Rosenthal and L.F. Jacobson, "Teacher Expectations for the Disadvantaged," *Scientific American*, 1968 (b), pp. 218, 219–23; also, D. Bar Tal, "Interactions of Teachers and Pupils," in *New Approaches to Social Problems*, ed. I.H. Frieze, D. Bar Tal, and J.S. Carrol (San Francisco: Jossey Bass, 1979), pp. 337–58; also, U.S., Commission on Civil Rights, *Teachers and Students, Report V: Mexican American Education Study, Differences in Teacher Interaction With Mexican American and Anglo Students* (1973), pp. 22–23.

[15] Ibid.

[16] U.S., Department of Housing and Urban Development, *Measuring Racial Discrimination in American Housing Markets: The Housing Market Practices Survey* (1979); D.M. Pearce, "Gatekeepers and Home Seekers: Institutional Patterns in Racial Steering," in *Social Problems*, vol. 26 (1979), pp. 325–42; "Benign Steering and Benign Quotas: The Validity of Race Conscious Government Policies to Promote Residential Integration," *Harvard Law Review*, vol. 93 (1980), pp. 938, 944.

therefore move out of their neighborhoods if minorities do move in.[17]

- Parole officials who assume minority offenders are more dangerous or more unreliable than white offenders and consequently more frequently deny parole to minorities than to whites convicted of equally serious crimes.[18]

These contemporary examples of discrimination need not be motivated by conscious prejudice. The personnel manager is likely to deny believing that minorities and women can only perform satisfactorily in low level jobs even while acting in ways consistent with such beliefs. In some cases the minority or female applicants may not be aware that they have been discriminated against—the personnel manager may inform them that they are deficient in experience while rejecting their applications because of prejudice; the white male hiring official who recruits through his friends or white male work force excludes minorities and women who never learn of the available positions. The discriminatory results these activities cause may not even be desired. The guidance counselor may honestly believe there are no other realistic alternatives for minority and female students.

Whether conscious or not, open or hidden, desired or undesired, these acts build on and support prejudicial stereotypes, deny their victims opportunities provided to others, and perpetuate discrimination, regardless of intent.

Organizational Discrimination

Discrimination, though practiced by individuals, is often reinforced by the well-established rules, policies, and practices of organizations. These procedures may be officially approved, formal parts of organizational decisionmaking, or they may be unarticulated, informal ways of doing business. Whether formal or informal, they are the organization's standard operating procedures and are carried out by individuals as just part of their day's work.

Discrimination at the organizational level takes forms that are similar to those on the individual level. For example:

- Height and weight requirements that are unnecessarily geared to the physical proportions of white males without regard for the actual requirements needed to perform the job, and, therefore, exclude females and some minorities.[19]
- Seniority rules, when applied to jobs historically held only by white males, that make more recently hired minorities and females more subject to layoff—the "last hired, first fired" employee—and less eligible for advancement.[20]
- Nepotism-based membership policies of some referral unions that exclude those who are not relatives of members who, because of past employment practices, are usually white.[21]
- Restrictive employment leave policies, coupled with prohibitions on part-time work or denials of fringe benefits to part-time workers, that make it difficult for the heads of single-parent families, most of whom are women, to get and keep jobs and meet the needs of their families.[22]
- Rules requiring that only English be spoken at the workplace, even when not a business necessity, which result in discriminatory employment practices toward individuals whose primary language is not English.[23]
- Standardized academic tests or criteria, geared to the cultural and educational norms of the

[17] *See* M.N. Danielson, *The Politics of Exclusion* (New York: Columbia University Press, 1976), pp. 11–12; U.S., Commission on Civil Rights, *Equal Opportunity in Suburbia* (1974).

[18] *See* L.L. Knowles and K. Prewitt, eds., *Institutional Racism in America* (Englewood Cliffs, N.J.: Prentice Hall, 1969) pp. 58–77, and E.D. Wright, *The Politics of Punishment* (New York: Harper and Row, 1973). Also, S.V. Brown, "Race and Parole Hearing Outcomes," in *Discrimination in Organizations*, ed. R. Alvarez and K.G. Lutterman (San Francisco: Jossey Bass, 1979), pp. 355–74.

[19] Height and weight minimums that disproportionately exclude women without a showing of legitimate job requirement constitute unlawful sex discrimination. *See* Dothard v. Rawlinson, 433 U.S. 321 (1977); Bowe v. Colgate Palmolive Co., 416 F.2d 711 (7th Cir. 1969). Minimum height requirements used in screening applicants for employment have also been held to be unlawful where such a requirement excludes a significantly higher percentage of Hispanics than other national origin groups in the labor market and no job relatedness is shown. *See* Smith v. City of East Cleveland, 520 F.2d 492 (6th Cir. 1975).

[20] U.S., Commission on Civil Rights, *Last Hired, First Fired* (1976); Tangren v. Wackenhut Servs., Inc., 480 F. Supp. 539 (D. Nev. 1979), *notice of appeal filed* (9th Cir. Dec. 4, 1979).

[21] U.S., Commission on Civil Rights, *The Challenge Ahead, Equal Opportunity in Referral Unions* (1977), pp. 84–89.

[22] A. Pifer, "Women Working: Toward a New Society," pp. 13–34, and D. Pearce, "Women, Work and Welfare: The Feminization of Poverty," pp. 103–24, both in K.A. Fernstein, ed., *Working Women and Families* (Beverly Hills: Sage Publications, 1979). *See also*, U.S., Commission on Civil Rights, *Child Care and Equal Opportunity for Women* (1981), pp. 44–49. Disproportionate numbers of single-parent families are minorities. *See* U.S., Department of Commerce, Bureau of the Census, *Families Maintained by Female Householders 1970–79* (1980), p. 5.

[23] *See* EEOC, "Guidelines on Discrimination Because of National Origin," §1606.7, 45 Fed. Reg. 85635 (1980) (to be codified in 29 C.F.R. Part 1606).

middle-class or white males, that are not relevant indicators of successful job performance.[24]

- Preferences shown by law and medical schools in the admission of children of wealthy and influential alumni, nearly all of whom are white.[25]
- Credit policies of banks and lending institutions that prevent the granting of mortgage monies and loans in minority neighborhoods or prevent the granting of credit to married women and others who have previously been denied the opportunity to build good credit histories in their own names.[26]

Superficially "colorblind" or "gender neutral," these organizational practices have an adverse effect on minorities and women. As with individual actions these organizational actions favor white males. Even when taken with no deliberate intent to affect minorities and women adversely, they protect and promote the status quo arising from the racism and sexism of the past. If, for example, the jobs now protected by "last hired, first fired" provisions had always been integrated, seniority would not operate to disadvantage minorities and women. If many educational systems from kindergarten through college had not historically favored white males, more minorities and women would hold advanced degrees and thereby be included among those involved in deciding what academic tests should test. If minorities had lived in the same neighborhoods as whites, there would be no minority neighborhoods to which mortgage money could be denied on the basis of their being minority neighborhoods.

Such barriers to minorities and women too often do not fulfill legitimate needs of the organization, or these needs can be met through other means that adequately further organizational interests without discriminating. Instead of excluding all women on the assumption that they are too weak or should be protected from strenuous work, the organization can implement a reasonable test that measures the strength actually needed to perform the job or, where possible, develop ways of doing the work that require less physical effort. Admissions to academic and professional schools can be decided not only on the basis of grades, standardized test scores, and the prestige of the high school or college from which the applicant graduates, but also on the basis of community service, work experience, and letters of recommendation. Lending institutions can look at the individual and his or her financial ability rather than the neighborhood or marital status of the prospective borrower.

Some practices that disadvantage minorities and women are readily accepted aspects of everyday behavior. Consider the "old boy" network in business and education built on years of friendship and social contact among white males, or the exchanges of information and corporate strategies by business acquaintances in racially or sexually exclusive private clubs paid for by the employer.[27] These actions, all of which have a discriminatory impact on minorities and women, are not necessarily acts of conscious prejudice. Because such actions are so often considered part of the "normal" way of doing things, people have difficulty recognizing that they are part of a discriminatory process and, therefore, resist abandoning them despite the clearly discriminatory results. Consequently, many decisionmakers have difficulty considering, much less accepting, nondiscriminatory alternatives that may work just as well or better to advance legitimate organizational interests, but without systematically disadvantaging minorities and women.

This is not to suggest that all such discriminatory organizational actions are spurious or arbitrary. Many may serve the actual needs of the organization. Physical size or strength at times may be a legitimate job requirement; sick leave and insurance

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[24] *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971); U.S., Commission on Civil Rights, *Toward Equal Educational Opportunity: Affirmative Admissions Programs at Law and Medical Schools* (1978), pp. 11-12; I. Berg, *Education and Jobs: The Great Training Robbery* (Boston: Beacon Press, 1971), pp. 58-60.

[25] *See* U.S., Commission on Civil Rights, *Toward Equal Educational Opportunity*, pp. 14-15.

[26] *See* U.S., Commission on Civil Rights, *Mortgage Money: Who Gets It? A Case Study in Mortgage Lending Discrimination in Hartford, Conn.* (1974); J. Feagin and C.B. Feagin, *Discrimination American Style, Institutional Racism and Sexism* (Englewood Cliffs, N.J.: Prentice Hall, 1976), pp. 78-79.

[27] See *Club Membership Practices by Financial Institutions: Hearing Before the Committee on Banking, Housing and Urban Affairs, United States Senate*, 96th Cong., 1st sess. (1979). Pursuant to President Reagan's directive, the Office of Federal Contract Compliance Programs has withdrawn a rule it earlier proposed (45 Fed. Reg. 4954, 1980) that would have made the payment or reimbursement of membership fees in a private club that accepts or rejects persons on the basis of race, color, sex, religion, or national origin a prohibited discriminatory practice if such membership enhances employment opportunities. 46 Fed. Reg. 19004 (Mar. 27, 1981). It is the position of the Labor Department, however, that the Executive order provisions prohibiting discrimination and requiring affirmative action are "adequate to prevent an employer from using such memberships to structure the conduct of its businesses in a manner which creates employment discrimination." *Id.*

policies must be reasonably restricted; English proficiency and educational qualifications are needed for many jobs; lending institutions cannot lend to people who cannot reasonably demonstrate an ability to repay loans. Unless carefully examined and then modified or eliminated, however, these apparently neutral rules, policies, and practices will continue to perpetuate age-old discriminatory patterns into the structure of today's society.

Whatever the motivation behind such organizational acts, a process is occurring, the common denominator of which is the denial of equality of opportunity to large numbers of minorities and women.[28] When unequal outcomes are repeated over time and in numerous societal and geographical areas, it is a clear signal that a discriminatory process is at work.

Such discrimination is not a static, one-time phenomenon that has a clearly limited effect. Discrimination can feed on discrimination in self-perpetuating cycles:[29]

- The employer who recruits job applicants by word of mouth within a predominantly one-race, one-sex work force reduces the chances of receiving applications from people of another race or sex. Traditionally, those holding the most desirable jobs in the work force have been white males. If word-of-mouth recruiting is the method used to fill these jobs, minorities and women will have no opportunity to apply, since they will not hear about vacancies. Since they do not apply, they are not hired. Since they are not hired, they cannot recruit other minority or female applicants. Because there are no minority or female employees to recruit others, the employer is left to recruit from among its predominantly white and male work force.[30]
- The teacher who expects poor academic performance from minority and female students may not become greatly concerned when their grades are low. The acceptance of their low grades removes incentives to improve. Without incentives to improve, their grades remain low. Their low grades reduce their expectations, and the teacher has no basis for expecting more of them.[31]
- The realtor who assumes that white homeowners do not want minority neighbors "steers" minorities to minority neighborhoods. Those steered to minority neighborhoods tend to live in minority neighborhoods. White neighborhoods then remain white, and realtors tend to assume that whites do not want minority neighbors.[32]
- Elected officials appoint voting registrars who impose linguistic, geographic, and other barriers to minority voter registration. Lack of minority registration means that fewer minorities vote. Lower minority voting rates lead to the election of unresponsive officials. These elected officials then appoint voting registrars who maintain the same barriers.[33]

Structural Discrimination

Such self-sustaining discriminatory processes occur not only in employment, education, housing, and government, but also between these structural areas. There is a classic cycle of structural discrimination that reproduces itself. Discrimination in education denies the credentials to get good jobs. Discrimination in employment denies the economic resources to buy good housing. Discrimination in housing confines its victims to school districts providing inferior education, closing the cycle in a classic form.[34]

The cycles of discrimination that white women encounter differ from those minorities encounter, but all women face structural discrimination when they compete with men. When white women live with white men, the women share many of the material and educational advantages that the men enjoy. In addition, white males often pass such advantages on to their daughters or wives. But sharing resources is not the same as sharing power. Access to some of the same material resources that white males enjoy does not give white women the

[28] *See* discussion of the courts' use of numerical evidence of unequal results in Part B of this statement, "Civil Rights Law and the Problem."

[29] *See* U.S., Commission on Civil Rights, *For All the People. . . By All the People* (1969), pp. 122–23.

[30] *See* note 12.

[31] *See* note 14. Non-English-speaking students may suffer a similar fate. *See,e.g.*, Dexter Waugh and Bruce Koon, "Breakthrough for Bilingual Education: *Lau v. Nichols* and the San Francisco School System," *Civil Rights Digest*, vol. 6, no. 4 (1974), pp. 18–26.

[32] *See* notes 16 and 17.

[33] *See* Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, statement before the Subcommittee on Constitutional Rights, Committee on the Judiciary, U.S. Senate, on S.407, S.903, and S.1279, Apr. 9, 1975, pp. 15–18, based on U.S., Commission on Civil Rights, *The Voting Rights Act: Ten Years After* (January 1975).

[34] *See,e.g.*, U.S., Commission on Civil Rights, *Equal Opportunity in Suburbia* (1974).

ability to obtain these resources independently. In this sense, white women are caught in a discriminatory cycle that neutralizes the advantages derived by relationships with white men. The educational experiences of white women perhaps best illustrate this cycle. Educational programs, most conspicuously vocational and athletic programs,[35] have significantly disadvantaged white females, although not in the same ways or to the same degree as segregated minorities. On the whole, girls tend to perform at least as well as boys in elementary and high school and even in higher educational programs.[36] Nonetheless, females as a group have yet to do as well in the employment market as do similarly or less educated males.[37]

For women who are minorities, discriminatory cycles may have even more devastating effects. Minority women are subject to the same types of discrimination as white women, but cannot draw on the resources available in the white community. For minority women, the cycle of discrimination is as tightly closed and rigidly self-perpetuating as it is for minority men.

Regarding the similarities and differences between the discrimination experienced by women and minorities, one author has aptly stated:

> [W]hen two groups exist in a situation of inequality, it may be self-defeating to become embroiled in a quarrel over which is more unequal or the victim of greater oppression. The more salient question is how a condition of inequality for both is maintained and perpetuated—through what means is it reinforced?[38]

It is far more productive to understand the various forms and dynamics of the discrimination that minorities and women experience than to engage in endless, value-laden debates over who is suffering more. The nature and extent of the processes that cause the suffering should be the focus of analysis, not just the pain and unfairness caused by those processes.

The following are additional examples of the interaction among social structures that affects minorities and women:

- The absence of minorities and women from executive, writing, directing, news reporting, and acting positions in television contributes to unfavorable stereotyping on the screen, which in turn reinforces existing stereotypes among the public and creates psychological roadblocks to progress in employment, education, and housing.[39]
- Living in inner-city high crime areas in disproportionate numbers, minorities, particularly minority youth, are more likely to be arrested and are more likely to go to jail than whites accused of similar offenses, and their arrest and conviction records are then often used as bars to employment.[40]
- Because of past discrimination against minorities and women, female- and minority-headed businesses are often small and relatively new. Further disadvantaged by contemporary credit and lending practices, they are more likely than white-male-owned businesses to remain small and be less able to employ full-time specialists in applying for government contracts. Because they cannot monitor the availability of government contracts, they do not receive such contracts. Because they cannot demonstrate success with government contracts, contracting officers tend to favor other firms that have more experience with government contracts.[41]

Discriminatory actions by individuals and organizations are not only pervasive, occurring in every sector of society, but also cumulative, with effects limited neither to the time nor the particular structural area in which they occur. This process of discrimination, therefore, extends across generations, across organizations, and across social structures in self-reinforcing cycles, passing the disadvantages incurred by one generation in one area to future generations in many related areas.[42]

[35] *See generally* U.S., Commission on Civil Rights, *More Hurdles to Clear: Women and Girls in Competitive Athletics* (1980).

[36] Ruth Bader Ginsburg, "Realizing The Equality Principle," in *Social Justice and Preferential Treatment*, ed. William Blackstone and Robert Heslep (Athens: University of Georgia Press, 1977), pp. 136–37.

[37] Elizabeth McTaggart Almquist, *Minorities, Gender, and Work* (Lexington, Mass.: Lexington Books, 1979), p. 181.

[38] Chafe, *Women and Equality*, p. 78.

[39] U.S., Commission on Civil Rights, *Window Dressing on the Set* (1977).

[40] *See* note 18; Gregory v. Litton Systems, Inc., 472 F.2d 631 (9th Cir. 1972); Green v. Mo.-Pac. R.R., 523 F.2d 1290 (8th Cir. 1975).

[41] *See* U.S., Commission on Civil Rights, *Minorities and Women as Government Contractors* (1975), pp. 20, 27, 125.

[42] *See,e.g.*, A. Downs, *Racism in America and How to Combat It* (prepared for the U.S. Commission on Civil Rights, 1970); "The Web of Urban Racism," in *Institutional Racism in America*, ed. Knowles and Prewitt, pp. 134–76. Other factors in addition to race, sex, and national origin may contribute to these interlocking institutional patterns. In *Equal Opportunity in Suburbia* (1974), this Commission documented what it termed "the cycle of urban poverty" that confines minorities in central cities with declining

These interrelated components of the discriminatory process share one basic result: the persistent gaps seen in the status of women and minorities relative to that of white males. These unequal results themselves have real consequences. The employer who wishes to hire more minorities and women may be bewildered by charges of racism and sexism when confronted by a genuine shortage of qualified minority and female applicants. The guidance counselor who sees one promising minority student after another drop out of school or give up in despair may resent allegations of racism when there is little he or she alone can do for the student. The banker who denies a loan to a female single parent may wish to act differently, but believes that prudent fiscal judgment requires taking into account her lack of financial history and inability to prove that she is a good credit risk. These and other decisionmakers see the results of a discriminatory process repeated over and over again, and those results provide a basis for rationalizing their own actions, which then feed into that same process.

When seen outside the context of the interlocking and intertwined effects of discrimination, complaints that many women and minorities are absent from the ranks of qualified job applicants, academically inferior and unmotivated, poor credit risks, and so forth may appear to be justified. Decisionmakers like those described above are reacting to real social problems stemming from the process of discrimination. But many too easily fall prey to stereotyping and consequently disregard those minorities and women who have the necessary skills or qualifications. And they erroneously "blame the victims" of discrimination,[43] instead of examining the past and present context in which their own actions are taken and the multiple consequences of these actions on the lives of minorities and women.

The Process of Discrimination

Although discrimination is maintained through individual actions, neither individual prejudices nor random chance can fully explain the persistent national patterns of inequality and underrepresentation. Nor can these patterns simplistically be blamed on the persons who are at the bottom of our economic, political, and social order. We regard as an age-old canard of bigotry that the victims of discrimination have only themselves to blame for their victimization. Public opinion polls indicate that overt racism and sexism based on attitudes of white and male supremacy have been widely repudiated, but our history of discrimination based on race, sex, and national origin has not been readily put aside. Past discrimination continues to have present effects. The task today is to identify those effects and the forms and dynamics of the discrimination that reproduce them.

Discrimination against minorities and women should now be viewed as an interlocking process involving the attitudes and actions of individuals and the organizations and social structures that guide individual behavior. That process, started by past events, now routinely bestows privileges, favors, and advantages on white males and imposes disadvantages and penalties on minorities and women. This process is also self-perpetuating. Many normal, seemingly neutral, operations of our society create stereotyped expectations that justify unequal results; unequal results in one area foster inequalities in opportunity and accomplishment in others; the lack of opportunity and accomplishment confirms the original prejudices or engenders new ones that fuel the normal operations generating unequal results.

As we have shown, the process of discrimination involves many aspects of our society. No single factor sufficiently explains discrimination, and no single means will suffice to eliminate it. We must continuously examine such elements of our society as our history of *de jure* discrimination, deeply ingrained prejudices,[44] inequities based on economic

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tax bases, soaring educational and other public needs, and dwindling employment opportunities, surrounded by largely white, affluent suburbs. This cycle of poverty, however, started with and is fueled by discrimination against minorities. *See also* W. Taylor, *Hanging Together, Equality in an Urban Nation* (New York: Simon & Schuster, 1971).

[43] The "self-fulfilling prophecy" is a well-known phenomenon. "Blaming the victim" occurs when responses to discrimination are treated as though they were the causes rather than the results of discrimination. *See* Chafe, *Women and Equality*, pp. 76–78; W. Ryan, *Blaming the Victim* (New York: Pantheon Books, 1971).

[44] *See,e.g.*, J.E. Simpson and J.M. Yinger, *Racial and Cultural Minorities* (New York: Harper and Row, 1965), pp. 49–73; J.M. Jones, *Prejudice and Racism* (Reading, Mass.: Addison Wesley, 1972), pp. 60–111; M.M. Tumin, "Who Is Against Desegregation?" in *Racial and Ethnic Relations*, ed. H. Hughes (Boston: Allyn & Bacon, 1970), pp. 76–85; D.M. Wellman, *Portraits of White Racism* (Cambridge: Cambridge University Press, 1977).

and social class,[45] and the structure and function of all our economic, social, and political institutions[46] in order to understand their part in maintaining or countering discriminatory processes.

It may be difficult to identify precisely all aspects of discriminatory processes and assign those parts their appropriate weight. But understanding how discrimination works starts with an awareness that it is a process, and that to avoid perpetuating it, we must carefully assess the context and consequences of our everyday actions.

The Commission believes that a more productive and pragmatic approach toward eliminating discrimination starts with an informed awareness of the forms, dynamics, and subtleties of the process of discrimination. Decisionmakers are then better able to develop programs utilizing the tools of administration to change an organization's practices to those that promote equality instead of support continued inequality. The problem-remedy approach advanced in this statement is intended as an aid toward moving in that direction.

[45] *See,e.g.,* D.C. Cox, *Caste, Class and Race: A Study in Social Dynamics* (Garden City, N.Y.: Doubleday, 1948); W.J. Wilson, *Power, Racism and Privilege* (New York: MacMillan, 1973).

[46] H. Hacker, "Women as a Minority Group," *Social Forces,* vol. 30 (1951), pp. 60–69; J. Feagin and C.B. Feagin, *Discrimination American Style;* Chafe, *Women and Equality;* J. Feagin, "Indirect Institutionalized Discrimination," *American Politics Quarterly,* vol. 5 (1977), pp. 177–200; M.A. Chesler, "Contemporary Sociological Theories of Racism," in *Towards the Elimination of Racism,* ed. P. Katz (New York: Pergamion Press, 1976); P. Van den Berghe, *Race and Racism: A Comparative Perspective* (New York: Wiley, 1967); S. Carmichael and C. Hamilton, *Black Power* (New York: Random House, 1967); Knowles and Prewitt, *Institutional Racism in America;* Downs, *Racism in America and How to Combat It.*

Part B

Civil Rights Law and Affirmative Action

This statement started from the premise that the remedy of affirmative action can be most productively discussed by reference to discrimination, the problem it was created to address.

Lawyers often equate "discrimination" with activities prohibited by law and commonly limit remedies to attempts to correct such illegal acts. This statement, however, defines "discrimination" to include all the expressions of discrimination related to race, sex, and national origin explained in the preceding section of this statement, whether legal or illegal. Correspondingly, the term "remedy" as used here encompasses all antidiscrimination measures, including those that take race, sex, and national origin into account.

This broader definition has been used because civil rights laws do not prohibit all forms of discrimination experienced by minorities and women, especially the more complex processes of discrimination. Such discrimination may continue due to practical difficulties in establishing that a legal violation has, in fact, occurred.[1] In addition, despite consistently unequal results, some discrimination is entirely lawful.[2] If civil rights laws are interpreted to restrict the use of affirmative action to those acts that are or may be illegal, they can put beyond remedial reach essential components of the process of discrimination described in Part A.

Civil rights law already requires the imposition of even the most controversial measures taking race, sex, or national origin into account when necessary to remedy illegal discrimination. These laws also encourage the voluntary implementation of affirmative action plans to eliminate all other forms of discrimination. Depending on the circumstances, these voluntary corrective efforts may include the use of quotas and "preferential treatment."[3] The legal issue has evolved from the general question of whether affirmative action is ever lawful to the more particular question of what specific measures taking race, sex, and national origin into account within affirmative action plans are lawful in which circumstances to remedy what forms of discrimination.

This section examines civil rights laws as they both support and are supported by the problem-remedy approach to the issue of affirmative action. It shows, first, how civil rights laws acknowledge the numerous forms of discrimination, including the

[1] Civil rights plaintiffs, for example, often have the difficult, and sometimes impossible, burden of proving discriminatory intent. *See Harvard Civil Rights-Civil Liberties Law Review*, vol. 12 (1977), p. 725. In Title VII cases, class action litigation and use of statistical data to show discrimination have become increasingly expensive, complex, and time-consuming. *See,e.g.*, W. Connolly and D. Peterson, *Use of Statistics in Equal Opportunity Litigation* (New York: Law Journal Seminars-Press, 1979); B. Schlei and P. Grossman, *Employment Discrimination Law* (1976), pp. 1161–93.

[2] For example, employers may lawfully hire only white males for certain jobs if discrimination in education or by other employers has prevented minorities and women from acquiring the qualifications or experience actually necessary to perform the jobs. *See, e.g.*, United Steelworkers of America v. Weber, 443 U.S. 193, 214 (1979) (Blackmun, J., concurring). The Supreme Court and others have referred to discrimination for which no one in particular can legally be held accountable as "societal" discrimination. See Part B of this statement, "Voluntary Affirmative Action," below.

[3] Goals, quotas, and preferential treatment as legal issues are addressed in Part B, "Civil Rights Law and the Remedy," below; they are addressed as policy issues in Part C, "Goals, Quotas, and 'Preferential Treatment'."

overall process of discrimination affecting minorities and women. Next, it discusses how these laws combat discrimination through various required remedies, including affirmative action plans containing remedies that explicitly use race, sex, and national origin as criteria in decisionmaking. Finally, this section addresses the issue of voluntary affirmative action and explains the conditions under which the same remedies ordered by the courts and Federal civil rights agencies for illegal discrimination may be voluntarily undertaken without incurring legal liability.

Civil Rights Law and the Problem

As Part A discussed, discrimination is manifested most frequently and tellingly by the unequal outcomes it generates. Accordingly, courts and enforcement agencies rely on statistics showing disparate results among race, sex, and national origin groups as indicators of the likely presence or absence of illegal discrimination.

For example, the Supreme Court of the United States has said that numerical evidence showing a marked exclusion or underrepresentation of minorities in jobs, classrooms, geographic areas, or juries:

> raises a strong inference that. . .discrimination and not chance has produced this result because elementary principles of probability make it extremely unlikely that a random selection process would. . .so consistently reduc[e] the number. . . .[4]

That "strong inference" can be rebutted, however, by demonstrating in a particular circumstance that other factors unrelated to race, sex, or national origin have produced the unequal result.[5] Unequal results as a matter of law, therefore, are only *quantitative* suggestions of discriminatory conduct; they do not conclusively establish the presence of illegal discrimination. They help identify the *qualitative* actions, and the motivation, that caused the unequal outcomes.

Because discrimination can be either intended or unintended, civil rights law has two markedly different legal standards for determining when illegal discrimination has occurred.[6] Constitutional guarantees of equal protection of the law, contained in the 5th and 14th amendments, are violated only by intentional, purposeful, or deliberate actions[7] that harm persons because of their race, national origin, or sex.[8] Various laws, however, such as Title VII of the Civil Rights Act of 1964,[9] Executive Order No. 11246,[10] and the Emergency School Aid Act,[11] forbid actions, regardless of their intent, that have a disproportionate effect on the basis of race, national origin, and sex and that cannot be justified by any legitimate reason.

Although both the "intent" and the "effects" standards use statistical data in determining whether illegal discrimination has occurred, such data serve distinctly different purposes. In "intent" cases, the courts have had to develop a variety of ways to determine whether intentional discrimination exists, because few decisionmakers publicize or otherwise expose their discriminatory intent. Primary among these is numerical evidence of unequal results because "[i]n many cases the only available avenue of proof is the use of. . .statistics to uncover clandestine and covert discrimination."[12] Other factors that may indicate such discriminatory intent include the sequence of events leading to the decision, abnormal procedures, the historical background of the decision, and contemporary statements by decisionmakers.[13]

In "effects" cases, however, numerical evidence is not used to assess the likelihood that the accused

[4] Alexander v. Louisiana, 405 U.S. 625, 630 (1972) *(prima facie* case of racial discrimination established by the disproportionate exclusion of blacks from grand juries); accord, Int'l Bhd. of Teamsters v. U.S., 431 U.S. 324, 339–340 (1977). The same principle is applied in sex discrimination cases. *See, e.g.,* Dothard v. Rawlinson, 433 U.S. 321, 329–30 (1977).

[5] *Id.* at 632. *See also* Griggs v. Duke Power Co., 401 U.S. 424 (1971), discussed in the text accompanying notes 14–20, below.

[6] *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335–36 n.15 (1977), in which the Supreme Court distinguished between "disparate treatment" cases, where proof of discriminatory intent is critical, and "disparate impact" cases, where proof of discriminatory intent is not required. "Either theory, of course, may be applied to a particular set of facts." *Id.*

[7] Intentional discrimination on the basis of race, color, religion, sex, or national origin can also violate Title VII of the Civil Rights Act of 1964, as well as other statutes. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

[8] *See, e.g.,* Washington v. Davis, 426 U.S. 229, 238–39 (1976); Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 273 (1979).

[9] 42 U.S.C. §§2000e—2000e–17 (1976).

[10] 3 C.F.R. 339 (1965), *reprinted in* 42 U.S.C. §6000e, at 1232 (1976).

[11] 20 U.S.C. §§3191–3207 (Supp. II 1978); *see* Board of Educ. v. Harris, 444 U.S. 130, 140–52 (1979).

[12] Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 339–40 n. 20 (1977), *quoting* United States v. Ironworkers Local 86, 443 F.2d 544, 551 (9th Cir. 1971).

[13] Furnco Constr. Corp. v. Waters, 438 U.S. 567, 579–80 (1978); Village of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 266–68 (1977); Washington v. Davis, 426 U.S. 229, 238–39 (1976).

discriminator has intentionally caused harm to the victim on the basis of race, national origin, or sex because the intent of the discriminator is not determinative. In these cases, numerical evidence emphasizes the existing unequal conditions in our society, whether they are caused by one discriminator or many, intentionally or not.

Perhaps the single most important decision in the evolution of equal employment opportunity law, *Griggs v. Duke Power Co.*,[14] best explains this significant difference between an "intent" and an "effects" standard. In *Griggs* the Supreme Court interpreted Title VII of the 1964 Civil Rights Act to invalidate general intelligence tests and other criteria for employment that disproportionately excluded minorities, because these selection devices were not shown to be dictated by "business necessity."[15] Although the lower courts had found that Duke Power's tests were not deliberately discriminatory, the Supreme Court concluded:

> [G]ood intent or [the] absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability.[16]

Not all employment selection mechanisms that have an "adverse impact" or "disparate effect" (that is, screen out a significantly higher percentage of minorities and women than whites or males when compared to their presence in the relevant labor market) are unlawful. Only those that cannot be shown to be job related are unlawful. *Griggs* establishes that the employer must demonstrate that practices which adversely affect the opportunities of minorities and women do, in fact, fairly measure or predict actual performance on the job.[17]

Griggs interpreted Title VII as requiring that "the posture and condition of the jobseeker be taken into account."[18] The Court recognized that the disproportionate failure rate of minorities on tests of the kind used by the Duke Power Company was caused by the inferior education they had received in the area's segregated schools. As the Supreme Court said in a later decision:

> *Griggs* was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the rest of their lives.[19]

By presuming on the basis of statistical data showing unequal results that illegal discrimination has occurred, *Griggs* recognizes the existence of a pervasive and interlocking process of discrimination in education, employment, and other areas. "Neutrality"—the presence of good or the absence of bad intent—in such a context will only perpetuate inequalities. To prevent the perpetuation of discrimination, the *Griggs* principle imposes a legal duty on employers and unions not to compound the discriminatory acts of others through their own arbitrary acts (i.e., using selection devices that have no direct relationship to the jobs to be performed).[20]

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[14] Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[15] *Id.* at 431.

[16] *Id.* at 432.

[17] *Id.* at 436. Pursuant to *Griggs* and other cases, the four Federal agencies having primary responsibility for the enforcement of Federal equal employment opportunity laws (the Equal Employment Opportunity Commission, the Civil Service Commission—now the Office of Personnel Management, the Department of Labor, and the Department of Justice) adopted guidelines in 1978 establishing a uniform Federal Government position with respect to selection procedures having an adverse impact. Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §1607 (1979) (hereafter cited as Uniform Guidelines on Employee Selection Procedures). The fundamental principle underlying the guidelines is that employment selection practices that have an adverse impact on the employment opportunities of members of any race, sex, or ethnic group are illegal under Title VII and Executive Order No. 11246, unless justified by business necessity. An employer may usually avoid the task of justifying its selection procedures by using procedures that have no adverse impact or by choosing alternatives that further its business needs with lesser adverse impact. 29 C.F.R. §§1607.3B, 1607.4C, 1607.6. For example, if an employer ranks all applicants, and this ranking system does not cause minorities and women to be underrepresented in the employer's work force, the procedure is lawful under the guidelines. However, if the ranking system causes underrepresentation, the guidelines advise the use of alternate procedures, such as a pass/fail method, to assure the legality of the selection procedure. 29 C.F.R. §1607.5G.
Seniority systems are a partial exemption to the adverse impact rule. 29 C.F.R. §1607.3C. The Supreme Court has held that under §703(h) of Title VII, a *bona fide* seniority system (one that does not have its genesis in intentional discrimination) is lawful even where the employer is shown to have engaged in past discriminatory hiring and promotion practices and the effects of those practices are perpetuated by the seniority system. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

[18] 401 U.S. at 431.

[19] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 806 (1973).

[20] Founded as it is on the historical and current process of discrimination against minorities and women, the *Griggs* principle cannot sensibly be applied to white males. There is no history of discrimination against white males because of the color of their skin or their gender, no interacting individual, organizational, and structural attitudes and actions denying white males opportunities that disadvantage them in the job market on account of their race and/or sex. Title VII does ban deliberate discrimination against

Numerical evidence of unequal results, however, is not conclusive proof that illegal discrimination has been committed. Under the "effects" test, the actions that produced such results are lawful if there is no reasonable alternative other than to perpetuate the unequal results. Nor is evidence of unequal results caused only by parts of an employer's operations likely to be scrutinized by Federal enforcement agencies. If the outcome of the total selection procedure—its "bottom line" statistical profile—shows that minorities and women are employed in rough proportion to their participation in the relevant work force, Federal enforcement agencies will allocate their limited enforcement resources elsewhere.[21]

Civil Rights Law and the Remedy

Because Federal civil rights agencies and courts view unequal results as a strong indication that discrimination may have occurred, they also view the reduction of unequal results as a strong indication that such discrimination is being remedied. Consequently, some civil rights laws require affirmative action plans that include numerical measures which affirmatively take account of race, sex, and national origin.[22] Other laws mandate such affirmative action as needed to remedy identified illegal acts.[23]

To remedy constitutional violations in school desegregation cases, for example, courts normally set mathematical ratios of majority to minority students in the school system as a "starting point in the process of shaping a remedy."[24] These mathematical ratios, the Supreme Court has ruled, are not "inflexible requirement[s]."[25] Indeed, courts permit significant deviation from these ratios when one-race schools are not the products of earlier deliberately segregative acts by school officials. But once a systemwide constitutional violation has been established, the burden is on the school authorities to overcome the presumption that the racial composition of such schools is the result of present or past discriminatory acts on their part.[26]

This legal presumption recognizes that "[p]eople gravitate toward school facilities, just as schools are located in response to the needs of people."[27] The "profound reciprocal effect" between the decisions of school authorities and the housing decisions of parents, the Supreme Court has stated, dictates the "common sense" conclusion that the actions of school authorities "have an impact beyond the particular schools that are the subjects of those actions."[28]

Once again, the law is acknowledging the interlocking nature of the discriminatory process. Racial neutrality in school assignments will inevitably perpetuate segregation when applied to the "loaded game board"[29] of a community with segregated schools and segregated housing.

Unconstitutional school segregation, the courts have found, can best be remedied through desegregation plans that use numerical measures. These numerical targets are starting points for the remedy, however, not the remedy itself. School desegregation plans use a variety of *qualitative* desegregative techniques (including redrawing school attendance zones; opening, closing, or building schools; pairing and clustering schools; magnet schools; optional majority to minority transfers; and student transpor-

white males because of their race and/or sex, and such arbitrary action has been found to have occurred. *See, e.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) (white male employees who misappropriated cargo and were discharged while a black male employee, also involved in such theft, was retained have a cause of action under Title VII); Calcote v. Texas Educational Foundation, Inc., 458 F. Supp. 231 (W.D. Tex. 1976), *aff'd*, 578 F.2d 95 (5th Cir. 1978) (white male was paid a lower salary, received smaller salary increases than an equally qualified black male, and was harassed because of his race); Sawyer v. Russo, 19 Empl. Prac. Dec. par. 8996 (D.D.C. 1979) (qualified white male was passed over for promotion by black supervisors in favor of lesser qualified black applicants and in violation of regulations). Such discrimination, however, is isolated and not part of a self-perpetuating process of discrimination such as that experienced by minorities and women.

[21] Under the "bottom line" formulation of the Uniform Guidelines on Employee Selection Procedures, if the business' total selection process reveals no adverse impact, Federal enforcement agencies in the exercise of their administrative and prosecutorial discretion generally will not take enforcement action, even where adverse impact may be caused by a component of the process. 29 C.F.R. §1607.4C (1979). *But see* Connecticut v. Teal, 645 F.2d 133, *cert. granted*, 50 U.S.L.W. 3213 (October 1981), which will consider whether illegal discrimination has occurred where one "pass-fail" component of a promotion procedure has an adverse impact on minorities, but the overall promotion procedure results in no adverse impact.

[22] Exec. Order No. 11246, 3 C.F.R. 339 (1965), *reprinted as amended* at 42 U.S.C. §2000c at 1232 (1976); Civil Rights Act of 1964, *as amended*, Title VII, §717, 42 U.S.C. §2000e-16 (1976).

[23] Civil Rights Act of 1964 as amended, Title VII, §706(g), 42 U.S.C. §2000c-5(g) (1976).

[24] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 25 (1971).

[25] *Id.*

[26] *Id.* at 26; Keyes v. School Dist. No. 1 (Denver), 413 U.S. 189, 208–10 (1973).

[27] *Id.* at 20.

[28] Keyes v. School Dist. No. 1, 413 U.S. 189, 202–03 (1973).

[29] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. at 28.

tation) whose effectiveness is judged by *quantitative* measures.

Numerically based remedies are also used in the Federal contract compliance program under Executive Order No. 11246, as amended,[30] which requires businesses that contract with the Federal Government to agree as a condition of their contracts not to discriminate and to take affirmative action. This general affirmative action requirement, when first added to the contract compliance program in 1961, generated little progress. By the end of the 1960s, enforcement officials realized that discernible indicators of progress were needed to ensure that Federal contractors, particularly construction contractors and building trades unions, made necessary changes in their employment practices. Simultaneously, there was a growing recognition that even if personal and overt discrimination were ended, equal employment opportunity could still be denied; a "color-conscious" approach emphasizing the results of employment procedures was needed to overcome the present effects of past discrimination.[31] This experience led Federal contract compliance enforcement officials to require contractors to develop affirmative action programs that used "goals and timetables" to judge the results of the contractors' good-faith efforts to comply with Executive Order 11246.[32]

The contract compliance program currently[33] requires businesses and institutions that choose to contract with the Federal Government to have an affirmative action program,[34] the objective of which is equal employment opportunity. The Federal contract compliance program allows Federal contractors much flexibility in devising meaningful and specific procedures to bring about equal opportunity in the workplace. These procedures are contained in the contractor's affirmative action program, which the contractor itself develops. The program is based on "self-analysis" of the contractor's patterns of employment of minorities and women in all job categories.[35] This quantitative analysis helps assess the level of "utilization"[36] of minorities and women by comparing the contractor's employment of minorities and women with the proportion of minorities and women in the relevant available labor pool.[37] The contractor then undertakes a qualitative analysis to identify and change those employment practices that produce these statistical results.[38]

On the basis of this analysis, the contractor is required to develop "goals and timetables" for each job group in which minorities or women are underutilized.[39] Such standards are used to indicate success or failure of affirmative action programs in over-

[30] 3 C.F.R. 339 (1965), *reprinted in* 42 U.S.C. §2000e, at 1232 (1976). Executive Order No. 11246 was amended by Executive Order No. 11375 in 1967 to prohibit discrimination on the basis of sex. *See* 3 C.F.R. 684 (1967).

[31] See R. Nathan, *Jobs and Civil Rights* (prepared for the U.S. Commission on Civil Rights by the Brookings Institution, 1969), pp. 92–100; U.S., Commission on Civil Rights, *Federal Civil Rights Enforcement Effort* (1971), pp. 42, 50–55, 60.

[32] For a full discussion of the history of the Executive order program and its strengths and weaknesses, see U.S., Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974*, vol. 5, *To Eliminate Employment Discrimination* (1975), pp. 230–70.

[33] In the early 1970s detailed regulations were issued by the Office of Federal Contract Compliance Programs (OFCCP) of the Department of Labor, the agency that enforces Executive Order No. 11246, giving more specific content to the general affirmative action requirement. 41 C.F.R. Part 60–2, known as Revised Order No. 4, was issued in 1970 and revised in 1971, and is applicable only to *nonconstruction* contractors. 41 C.F.R. Part 60–4 closely conforms the affirmative action requirements for *construction* contractors to those of Revised Order No. 4. See U.S., Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974*, vol. 5, *To Eliminate Employment Discrimination* (1975), pp. 230–70. The Department of Labor in the summer of 1981 proposed new regulations covering Federal contractors that make a number of changes in these regulations. 46 Fed. Reg. 42968, 42979 (Aug. 25, 1981). Included in the proposed regulations are new provisions for higher coverage thresholds, abbreviated affirmative action plans for small contractors, and the use of extended affirmative action plans for up to 5 years in some circumstances. The Department of Labor has also sought public comment on five areas affecting the contract compliance program in anticipation of future changes in its regulations. These five areas are (1) the method used to determine the "availability" of minorities and women for employment with nonconstruction contractors; (2) the appropriateness of backpay as a remedy; (3) the Executive order coverage of a Federal construction contractor's nonfederally funded construction projects; (4) the methods used to set goals for women and minorities in construction; and (5) the method used to determine and apply the concept of "job groups." 46 Fed. Reg. 36213 (July 14, 1981); 46 Fed. Reg. 42490 (Aug. 21, 1981).

[34] An affirmative action program is "a set of specific and result-oriented procedures to which a contractor commits itself to apply every good faith effort." 41 C.F.R. §60–2.10 (1980).

[35] *Id.* §§60–2.10 to 2.11; §60–2.13(d) and (g).

[36] *Id.* §60–2.11(b)(1) and (2).

[37] The availability analysis may vary depending on the industry involved or the location of the industry involved. For example, the regulations require the contractor to consider eight factors in determining the availability of minorities and women for jobs. 41 C.F.R. §60–2.11(b)(1) and (2). The regulations do not designate how much relevancy must be accorded each factor.

[38] *Id.* §60–2.24.

[39] *Id.* §60–2.12(h).

coming the underutilization of minorities and women.[40] Goals are not inflexible targets, and unlike quotas, they do not mandate that a specific number always be met.[41] They are objectives reflecting assessments of the percentage of minorities and women in the work force, the availability for employment of minorities and women with the requisite skills, and the existence of current or potential training programs that are available to prepare minorities and women for employment.[42] The government does not determine compliance with the Executive order solely by whether these targets are actually reached. If goals are not met within the time allotted, no sanctions are applied, as long as the contractor can demonstrate it has made "good faith efforts" to reach them.[43]

A contractor's good-faith efforts would be measured by the thoroughness of the contractor's self-analysis, the soundness of the contractor's procedures for increasing the utilization of minorities and females, and the extent to which attempts were made to carry out those procedures.[44] Contractors are not required to hire unqualified persons or to compromise demonstrably valid standards to meet the established goals. Indeed, the regulations repeatedly underline the importance of merit principles by instructing employers to recruit women and minorities "having requisite skills" and to make promotion decisions based only on "valid requirements" for the job.[45]

The Federal contract compliance program essentially uses a problem-remedy approach. It requires contractors to identify aspects of the employment process that produce underutilization and to take actions, including those that take account of race, sex, and national origin, to solve those problems. One court has listed some of the many causes of underutilization and the kinds of affirmative steps that can be taken, and it is worth quoting at length:

> Underutilization may be traced to failure of available women and minority workers to apply, for a variety of reasons, in the expected numbers. They may not be aware of job openings. If this is the problem, contacts may be established with local organizations, institutions, or individuals who are in a position to refer women and minority applicants; advantage may be taken of media and events through which potential women and minority applicants can be reached; and word-of-mouth recruiting by women and minority employees and applicants may be encouraged. Perhaps the contractor will discover that potential applicants are discouraged by the contractor's negative image among women workers or in the minority community. If so, the problem may be solved by designating minority liaison officers, or by widening dissemination of the contractor's fair employment policy and practices. Or deficiency in the flow of applications from women and minority workers may be attributable to persons other than the contractor—to labor unions or subcontractors, for example—whom the contractor can persuade to abandon exclusionary practices.
>
> If the contractor is attracting a balanced flow of applicants, underutilization may be the product of improper screening or selection processes. Facially objective job criteria that screen out women and minority workers disproportionately may prove to be irrelevant or only marginally related to job performance, and new and validated criteria can be substituted. Or the contractor may discover that hiring personnel entertain subjective biases (conscious or not) that can be corrected by instruction or training, or by removing biased officials from the hiring process.[46]

Under the regulations, contractors can ensure that their affirmative action plans are implemented by holding individual managers and employees responsible for carrying out company policy, by assigning specific responsibilities and duties under the plans, and by evaluating their employees' performance.[47]

Some critics of the Executive order program confuse goals and timetables with the procedures used to meet these objectives. Goals and timetables are routinely employed as administrative or management tools in various contexts because they are comprehensible and reviewable standards for assessing the effectiveness of new procedures.

Other critics of the Federal contract compliance program contend that the measures often needed to

[40] *Id.* §60–2.1(a).

[41] *Id.* §60–2.12(e).

[42] *Id.* §60–2.11(b). Although goals are crucial to monitoring the progress of affirmative action plans, they are only one of many procedures that comprise such programs. The popular press often incorrectly uses the terms "goals" and "affirmative action" interchangeably. The distinction among goals, affirmative action plans, and quotas is discussed in Part C, "Goals, Quotas and 'Preferential Treatment'."

[43] *Id.* §60–2.15.

[44] Such procedures include recruiting through advertisements in minority and women's magazines, publicizing EEO plans in company literature and on bulletin boards, notifying minority and women's organizations of EEO policy, obtaining union cooperation in carrying out affirmative procedures, analyzing position descriptions for accuracy, establishing formal career counseling programs, and using appropriate employee selection procedures. *Id.* §§60–2.20 to 2.26.

[45] *Id.* §§60–2.13(j) and 2.20(3).

[46] Legal Aid Soc'y v. Brennan, 608 F.2d 1319, 1343 (9th Cir. 1979) (citations omitted).

[47] 41 C.F.R. §§60–2.13, 2.21, 2.22 (1979).

meet the established goals and timetables amount to illegal "preferential treatment" and unconstitutional "quota" systems for minorities and women. They object less to affirmative action plans containing numerical goals than to measures sometimes found within affirmative action plans requiring that a specified numerical proportion of qualified minorities and women to white males be chosen in order to meet the goals. These specific mechanisms virtually guarantee that among qualified applicants a designated ratio or percentage of qualified minorities or women will be selected until a set number or percentage of people in targeted job categories are minorities or women. While neither the Executive order nor its implementing regulations explicitly approve or disapprove ratio or percentage selection systems for the purpose of meeting designated goals, the Office of Federal Contract Compliance Programs has routinely negotiated and approved ratio and percentage selection systems where contractors have not made good-faith efforts or are charged with illegal discrimination.[48] Despite numerous challenges to its constitutionality, the courts have consistently upheld the legality of Executive Order No. 11246.[49]

Affirmative action plans containing measures that implicitly or explicitly use race, sex, and national origin as criteria in decisionmaking are not confined to the Federal contract compliance program. The courts in Title VII cases have repeatedly ordered and approved ratio and percentage selection systems that regularly and predictably work to overcome a marked nonparticipation by minorities and women. Typical of this type of affirmative remedy is the plan in *Carter v. Gallagher,*[50] where a Federal court found that the Minneapolis Fire Department had illegally discriminated against minorities. The court ordered that 1 of every 3 employees hired by the department be a qualified minority person until at least 20 minority workers were employed. In other cases courts have also ordered the establishment of separate lists for minority and women eligibles and their selection from the top of each list in a proportion established by the court.[51]

Some courts that have upheld these and similar measures have not hesitated to call them "preferential" treatment or "quotas."[52] Other courts have termed them "goals,"[53] used the words "goals" and "quotas" interchangeably without apparent distinction,[54] or dismissed the debate that "goals" are legal and "quotas" are illegal as a "semantic dispute."[55]

Whatever they may be called, judicial experience has shown that ratio and percentage selection devices to attain numerical goals are appropriate in a variety of circumstances. Such measures have most often been ordered to assure compliance with legal

[48] *See* EEOC v. American Tel. & Tel. Co., 365 F. Supp. 1105, 1115–16 (E.D. Pa. 1973); Dep't of Labor v. Uniroyal, Inc., No. OFCCP 1977–1 (BNA/DLR Apr. 16, 1980) (consent decree); Weber v. Kaiser Alumimum and Chem. Corp., 416 F. Supp 761, 766 (D. La. 1976), *aff'd.* 563 F.2d 216 (5th Cir. 1977), *rev'd sub nom.* United Steelworkers of America v. Weber, 443 U.S. 193 (1979).

[49] *See, e.g.*, Associated Gen. Contractors v. Altshuler, 490 F.2d 9, 16–17 (1st Cir. 1973), *cert. denied,* 416 U.S. 957 (1974); Southern Ill. Builders Ass'n v. Ogilvie, 471 F.2d 680, 684–85 (7th Cir. 1972); Contractors Ass'n v. Sec'y of Labor, 442 F.2d 159, 171–73 (3rd Cir. 1971), *cert. denied,* 404 U.S. 854 (1971); Legal Aid Soc'y of Alameda County v. Brennan, 608 F.2d 1319, 1341–43 (9th Cir. 1979) *(dictum),cert. denied,* 100 S. Ct. 3010 (1980); U.S. v. Mississippi Power and Light Co., 638 F.2d 899 (5th Cir. 1981), *cert. denied* 50 U.S.L.W. 3271 (October 1981).

[50] 452 F.2d 315 (8th Cir.), *modified en banc,* 452 F.2d 327 (8th Cir. 1971), *cert. denied,* 406 U.S. 950 (1972).

[51] *E.g.*, United States v. City of Chicago, 549 F.2d 415, 436–37 (7th Cir.), *cert. denied,* 434 U.S. 875 (1977), *remedial order reconsidered and aff'd.* 631 F.2d 469 (7th Cir. 1980); Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333 (2d Cir. 1973), *cert. denied,* 421 U.S. 991 (1975); Boston Chapter NAACP v. Beecher, 504 F.2d 1017 (1st Cir. 1974), *cert. denied,* 421 U.S. 910 (1975); NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974); Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972).

[52] "[T]his court has held that such *preferential* relief violates neither the equal protection clause nor any provision of Title VII." United States v. City of Chicago, 549 F.2d 415, 437 (7th Cir.), *cert. denied,* 434 U.S. 875 (1977), *remedial order reconsidered and aff'd.* 631 F.2d 469 (7th Cir. 1980) (emphasis added) (citations omitted). "This court. . .has. . .sanctioned hiring *quotas* to cure past discrimination. . . ." Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333, 1340 (2d Cir. 1973) (emphasis added) (citations omitted). "The use of *quota* relief in employment discrimination cases is bottomed on the chancellor's duty to eradicate the continuing effects of past unlawful practices." NAACP v. Allen, 493 F.2d 614, 621 (5th Cir. 1974) (emphasis added). *See also* United States v. City of Chicago, *supra* at 436; United States v. Masonry Contractors Ass'n, 497 F.2d 871, 877 (6th Cir. 1974).

[53] "We use 'goal' rather than 'quota' throughout this opinion for the reason that. . .the term 'quota' implies a permanence not associated with 'goal'." Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622, 628 n.3 (2d Cir. 1974).

[54] *E.g.*, Patterson v. Newspaper and Mail Deliverers' Union, 514 F.2d 767, 772–74 (2d Cir. 1975); EEOC v. American Tel. & Tel. Co., 556 F.2d 167, 177–80 (3d Cir. 1977).

[55] "We refuse to engage in any semantic dispute over the difference in meaning between 'goals' and 'targets' on the one hand and 'quotas' on the other." United States v. City of Miami, 614 F.2d 1322, 1335 n.26 (5th Cir. 1980). *See also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 288–89 n.26 (1978) (opinion of Powell, J.): "Petitioner [the Regents of the University of California] prefers to view [the special admissions program] as establishing a 'goal' of minority representation in the Medical School. Respondent [Bakke], echoing the courts below, labels it a 'racial quota.' This semantic distinction is beside the point. . . ."

requirements when less clear-cut steps have proven ineffective.[56] In addition, when no real basis exists for choosing among a large number of equally qualified people, ratio procedures may be a simpler and more efficient way to increase participation by minority and women workers than other, less specific methods. As a result they are frequently used in consent decrees, judicially approved settlements of cases where illegal discrimination has not been proven, but only alleged by one party and denied by the other.[57] Finally, the same rationale for choosing these practical methods to settle cases supports their implementation before a case is even filed.[58]

It is these and other such explicit and straightforward affirmative uses of race, sex, and national origin to attain numerical goals that have drawn the most criticism.[59] The Supreme Court has consistently declined to hear cases challenging these remedial devices when ordered by the lower courts. Virtually all the Federal courts of appeal that have considered the legality of fixed numerical requirements in hiring and promotion have found them lawful when necessary to remedy proven discrimination.[60] These courts have also affirmed the legality of preferential remedies in consent decree cases, in which discrimination is only alleged and the dispute is settled by agreement of the parties prior to any judicial findings.[61]

The courts have formulated and permitted these remedies in situations where the interests of individual white male workers might be adversely affected.[62] The interests of white males have generally been considered in cases involving issues of promotion and seniority rather than hiring because:

> A hiring quota deals with the public at large, *none* of whose members can be identified individually in advance. A quota placed upon a small number of readily identifiable candidates for promotion is an entirely different matter. Both these men and the court know in advance that regardless of their qualifications and standing in a competitive examination, some of them may be bypassed for advancement solely because they are white.[63]

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[56] "[W]e. . .approve this course only because no other method was available for affording appropriate relief. . . ." Vulcan Soc'y v. Civil Serv. Comm'n, 490 F.2d 387, 398 (2d Cir. 1973); "[Q]uota relief was essential to make meaningful progress" as "no Negroes were hired in DPS support positions until the *Allen* court ordered affirmative relief. . . ." NAACP v. Allen, 493 F.2d 614, 620–21 (5th Cir. 1974). "[A]ffirmative hiring relief. . .is necessary. . .: a mere injunction against continued. . .discrimination was not effective." Morrow v. Dillard, 580 F.2d 1284, 1296 (5th Cir. 1978).

[57] *See e.g.*, United States v. City of Miami, 614 F.2d 1322, *rehearing granted*, 625 F.2d 1310 (5th Cir. 1980); United States v. City of Alexandria, 614 F.2d 1358 (5th Cir. 1980).

[58] *See United Steelworkers of America v. Weber*, discussed in the text accompanying notes 101–112, below.

[59] See Part C, "Goals, Quotas, and 'Preferential Treatment'."

[60] FIRST CIRCUIT: Boston Chapter NAACP v. Beecher, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); Associated Gen. Contractors v. Altshuler, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974); SECOND CIRCUIT: Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974); Bridgeport Guardians, Inc., v. Civil Serv. Comm'n, 482 F.2d 1333 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975); United States v. Wood, Wire & Metal Lathers Local 46, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); Vulcan Soc'y v. Civil Serv. Comm'n, 490 F.2d 387 (2d Cir. 1973); THIRD CIRCUIT: Erie Human Relations Comm'n v. Tullio, 493 F.2d 371 (3d Cir. 1974); Contractors Ass'n v. Sec'y of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971); FIFTH CIRCUIT: NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974); Morrow v. Crisler, 491 F.2d 1053 (5th Cir. 1974) (en banc), *cert. denied*, 419 U.S. 895 (1974); Local 53, Int'l Ass'n of Heat and Frost Insulators and Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969); SIXTH CIRCUIT: United States v. Masonry Contractors Ass'n, 497 F.2d 871 (6th Cir. 1974); United States v. Local 212, IBEW, 472 F.2d 634 (6th Cir. 1973); Sims v. Sheet Metal Workers Local 65, 489 F.2d 1023 (6th Cir. 1973); United States v. Local 38, IBEW, 428 F.2d 144 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970); SEVENTH CIRCUIT: United States v. City of Chicago, 549 F.2d 415 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977), *remedial order reconsidered and aff'd*, 631 F.2d 469 (7th Cir. 1980); Crockett v. Green, 534 F.2d 715 (7th Cir. 1976); Southern Ill. Builders Ass'n v. Ogilvie, 471 F.2d 680 (7th Cir. 1972); EIGHTH CIRCUIT: Setser v. Novack Investment Co., —F.2d—, No. 80–1100 (8th Cir., July 27, 1981) (en banc), [1981] 26 Empl. Prac. Dec. ¶31,995; Firefighters Institute for Racial Equality v. City of St. Louis, 588 F.2d 235 (8th Cir. 1978), *cert. denied*, 443 U.S. 904 (1979); United States v. N.L. Indus., Inc., 479 F.2d 354 (8th Cir. 1973); Carter v. Gallagher, 452 F.2d 327 (8th Cir. 1971) (en banc), *cert. denied*, 406 U.S. 950 (1972); NINTH CIRCUIT: United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); TENTH CIRCUIT: United States v. Lee Way Motor Freight, Inc., 625 F.2d 918, 944 (10th Cir. 1979) (remanded with instructions for adoption of affirmative hiring plan).

The Fourth Circuit, although it has not ordered the use of ratio or percentage selection systems as remedies for proven employment discrimination, has stated that "hiring quotas should be imposed only in the most extraordinary circumstances and where there is a compelling need." United States v. County of Fairfax, Va., 629 F.2d 932, 942 (4th Cir. 1980), citing Sledge v. J.P. Stevens & Co., Inc., 585 F.2d 625, 646 (4th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979). *See also* White v. Paperboard Corp., 564 F.2d 1073, 1091 (4th Cir. 1977).

[61] EEOC v. Amer. Tel. and Tel. Co., 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); United States v. City of Miami, 614 F.2d 1322, *rehearing granted*, 625 F.2d 1310 (5th Cir. 1980); United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); EEOC v Contour Chair Lounge Co., 596 F.2d 809 (8th Cir. 1979).

[62] White males as a class, as distinguished from individual members of that class, are often aided by affirmative action plans. See note 112, below.

[63] Kirkland v. N.Y. State Dept. of Correctional Servs., 520 F.2d

Thus, in hiring cases the courts generally are not confronted with individuals whose present interest in employment will be adversely affected by racial or gender preferences. In the relatively few hiring cases that have raised the interests of white males, the lower courts have consistently denied such challenges where affirmative relief was necessary to overcome past discrimination against minorities and women.[64]

In cases involving seniority issues, where the victims of past discrimination were identifiable, the courts have approved relief in the form of an award of seniority retroactive to the date of the individual's job application, despite the adverse effect of such a remedy on the interests of some white male workers.[65] According to the Supreme Court, an award of the seniority the individuals would have earned but for the wrongful treatment is necessary for them to be "made whole" by obtaining their "rightful place" in the hierarchy of seniority.[66] The Supreme Court has ruled that, in general, "a sharing of the burden of the past discrimination is presumptively necessary"[67] and the "expectations" of "arguably innocent" white male employees cannot act as a bar to measures eliminating the present effects of past discrimination.[68]

Although not uniform in their standards for sanctioning relief in promotion cases, the Federal courts of appeal on numerous occasions have approved quota remedies to prevent a recurrence of discrimination, even where such remedies might favor persons who are not identifiable victims of discrimination.[69] Affirmative relief, therefore, including quotas and preferential treatment, cannot be denied simply because it may be detrimental to the interests of some white males.[70]

Voluntary Affirmative Action

Title VII of the Civil Rights Act has been interpreted to have two purposes: (1) "to make persons whole for injuries suffered on account of unlawful employment discrimination"[71] and (2) to "provide the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history."[72] The latter purpose is the "primary" one,[73] for the obvious reason that voluntary changes eliminating discriminatory practices mean fewer people need to resort to the courts or enforcement agencies to be "made whole." Equal employment

420, 429 (2d Cir. 1975), *rehearing en banc denied*, 531 F.2d 5 (2d Cir. 1975) (emphasis added); accord, EEOC v. Local 638, Sheet Metal Workers' Int'l Ass'n, 532 F.2d 821, 828 (2d Cir. 1976).

[64] "This court. . .has. . .sanctioned *hiring* quotas to cure past discrimination." Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333, 1340 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975) (emphasis added); EEOC v. Local 638, Sheet Metal Workers' Int'l Ass'n, 532 F.2d 821, 828 (2d Cir. 1976). *See also, e.g.*, United States v. Local 212, IBEW, 472 F.2d 634 (6th Cir. 1973); United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir. 1971); Ass'n of Heat and Frost Insulators & Asbestos Workers v. Volger, 407 F.2d 1047 (5th Cir. 1969).

[65] Franks v. Bowman Trans. Co., Inc., 424 U.S. 747, 776–778 (1976).

[66] *Id.* at 767–68.

[67] *Id.* at 777.

[68] *Id.* at 774.

> Our holding is that in exercising their equitable powers, district courts should take as their starting point the presumption in favor of rightful-place seniority relief, and proceed with further legal analysis from that point; and that such relief may not be denied on the abstract basis of adverse impact upon interests of other employees but rather only on the basis of unusual adverse impact arising from facts and circumstances that would not be generally found in Title VII cases. *Id.* at 779, n.41.

[69] EEOC v. American Tel. & Tel. Co., 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); United States v. City of Chicago, 549 F.2d 415 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977), *remedial order reconsidered and aff'd*, 631 F.2d 469 (7th Cir. 1980); United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). The Second Circuit, however, upholds the use of quotas only in those cases where there is a "clear-cut pattern of long-continued and egregious racial discrimination" and where a quota would not result in "identifiable reverse discrimination." Kirkland v. New York State Dept. of Correctional Servs., 520 F.2d 420, 427 (2d Cir.), *rehearing en banc denied*, 531 F.2d 5 (2d Cir. 1975). *Accord, e.g.*, Ass'n Against Discrimination in Employment v. City of Bridgeport, 594 F.2d 306, 310 (2d Cir. 1979), *remedial order reconsidered and aff'd in part, remanded for modification in part*, 647 F.2d 256 (2d Cir. 1981); EEOC v. Local 638, Sheet Metal Workers' Int'l Ass'n, 532 F.2d 821, 828 (2d Cir. 1976). The Kirkland twofold test in effect rules out quota relief in promotion cases in the Second Circuit because in such cases some identifiable white men would almost always suffer "reverse discrimination." *See* text accompanying note 63 above. The question of quota relief has yet to be decided by an *en banc* panel and has been the subject of sharp differences of opinion among the members of the Second Circuit court. *See cases cited and discussed* in Ass'n Against Discrimination in Employment v. City of Bridgeport, 647 F.2d 256, 279 (2d Cir. 1981).

[70] This perspective is consistent with the Supreme Court's holding in United Steelworkers of America v. Weber, 443 U.S. 193, 208 (1979), that affirmative relief for minorities and women is permissible provided such relief does not "unnecessarily trammel the interests" of white workers. *Weber* is discussed in the text accompanying notes 101–112.

[71] Albermarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975).

[72] *Id.* at 417–18, *quoting* United States v. N.L. Indus., Inc., 479 F.2d 354, 379 (8th Cir. 1973). *Accord*, Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 364 (1977).

[73] *Id.* at 417.

law, in particular, and civil rights law, in general, impose legal obligations and liabilities while encouraging voluntary actions beyond those minimal legal requirements to accomplish as far as possible the policy objectives of the law.[74]

This distinction, between compliance with minimum legal requirements and voluntary actions to accomplish maximum policy objectives, is crucial, because civil rights law does not make illegal all aspects of discriminatory processes. In employment, for example, where other institutions have deprived minorities and women from getting the skills, experience, or credentials actually needed to perform particular jobs, employers and unions are under no legal duty to undertake special recruiting, training, or other programs to overcome their underemployment of minorities and women with such backgrounds.[75] A collective-bargaining agreement may lawfully perpetuate the employer's past discrimination by requiring that recently hired employees, who were the only minorities and women hired by the employer, be the first to be laid off, as long as such "last hired, first fired" provisions were negotiated without any intent to discriminate against minorities and women.[76]

The distinction between *de jure* (intentional) and *de facto* (unintentional) school segregation[77] is another example of how the law does not require the elimination of all manifestations of discriminatory processes. The 14th amendment prohibits only school segregation arising from purposeful or intentional acts by governmental authorities.[78] If segregated schools cannot be traced to such deliberate acts, they are considered "racially imbalanced," but constitutional.[79] The Supreme Court, however, has stated that school authorities may choose as a matter of policy to eliminate such racial imbalance, even when not required to do so, by prescribing a ratio of minority to majority students reflecting the overall makeup of the school system.[80]

These voluntary affirmative efforts to further the national policy to eliminate all vestiges of discrimination have themselves been attacked as violating civil rights law. Nowhere was this controversy given more public attention than in the area of academic admissions policy.[81]

The Supreme Court of the United States first considered the issue in *Regents of the University of California v. Bakke.*[82] The Medical School of the University of California at Davis was confronted, as were other institutions of higher education, with extraordinarily low rates of minority admissions. The school's first class had three Asians, but no blacks, Mexican Americans, or American Indians. To overcome this virtual exclusion of minorities, the school in 1970 implemented a special admissions program that, in effect, reserved 16 of 100 available openings for qualified minorities. A separate admissions committee reviewed applications for admission to these openings. Alan Bakke, a white male, alleged that his exclusion from consideration for any of these 16 places and the admission of minority applicants with lower academic credentials, as measured by standardized tests and undergraduate grade point average, discriminated against him on the basis of race in violation of the 14th amendment and Title VI of the Civil Rights Act of 1964.

Because neither Bakke nor the university introduced any evidence of constitutional or statutory violations, the courts all agreed that the medical school had violated no law that would obligate it to develop a special admissions program. The exclusion of minorities was not the result of illegal discrimination, but of "societal discrimination," which the

[74] *See generally* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 364 (1978) (Brennan, White, Marshall, and Blackmun, JJ., concurring in part, dissenting in part): "[O]ur society and jurisprudence have always stressed the value of voluntary efforts to further the objectives of the law. Judicial intervention is a last resort to achieve cessation of illegal conduct or the remedying of its effects rather than a prerequisite to action."

[75] The Uniform Guidelines on Employee Selection Procedures encourage but do not require such voluntary actions. 29 C.F.R. §1607 (1979).

[76] Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977). *But see* Oliver v. Kalamazoo Bd. of Educ., 23 FEP Cases 1677 (W.D. Mich. Sept. 30, 1980), *appeal docketed*, No. 80-1717 (6th Cir. Oct. 6, 1980).

[77] *See* Keyes v. School Dist. No. 1, 413 U.S. 189 (1973).

[78] *Id.* at 208.

[79] *Id.*; Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 17–18 (1971).

[80] 402 U.S. at 16; McDaniel v. Barresi, 402 U.S. 39 (1971).

[81] The Commission has examined affirmative admissions in higher education in *Toward Equal Educational Opportunity: Affirmative Admissions Programs at Law and Medical Schools* (1978).

[82] 438 U.S. 265 (1978). The constitutionality of affirmative admissions policies had been challenged earlier in DeFunis v. Odegaard, 416 U.S. 312 (1974). The Court ruled that case moot, however, because the plaintiff had been admitted to and was graduating from the law school whose admissions procedures he had challenged.

university described as "the effects of persistent and pervasive discrimination against racial minorities."[83] The issue was profound: Without evidence of illegal discrimination against minorities by the party taking affirmative action, are race-conscious remedial programs constitutional?

The nine Supreme Court Justices wrote six separate opinions. Two opinions were supported by four Justices each, but they reached opposing results. The ninth and deciding vote was cast by Justice Powell, who used reasoning distinctly different from that of the other Justices. The outcome was two different five-Justice majorities. One ruled the Davis plan illegal and ordered Bakke admitted to the school; the other set out standards and rationales for lawful affirmative admissions plans.[84]

The opinion authored by Justice Stevens, and joined by Chief Justice Burger and Justices Stewart and Rehnquist,[85] narrowed its focus to Bakke's statutory claim, thereby sidestepping the constitutional questions discussed in the other Justices' opinions. Title VI prohibits the exclusion of persons on the basis of race, color, or national origin from programs that receive Federal funds, including that of the Davis Medical School. Because the medical school conceded that Bakke's denial of admission resulted from the affirmative admissions plan, these Justices concluded that the university had violated the plain language of Title VI of the Civil Rights Act of 1964. Their opinion, however, specifically declined to address both the constitutionality of the Davis program and "whether race can ever be used as a factor in an admissions decision."[86]

Four other members of the Court (Justices Brennan, White, Marshall, and Blackmun) issued a joint opinion finding the Davis program lawful under both Title VI and the Constitution.[87] Governmental bodies may adopt race-conscious programs for the purpose of overcoming the present effects of their own past discrimination or of societal discrimination,[88] if the program is reasonable in light of this objective and does not stigmatize any group or disadvantage groups relatively unrepresented in the political process.[89]

Justice Powell's opinion,[90] joined fully by no other Justice, held that eliminating the effects of identified illegal or unconstitutional discrimination is a compelling justification for affirmative action. But unless governmental bodies have the authority to make findings of past unlawful discrimination, identify its effects, and then develop affirmative measures responsive to those findings, they may not make racial classifications favoring relatively victimized groups at the expense of innocent individuals.[91] Because the university did not have the requisite authority and could offer no other valid justification for its preferential treatment of minorities,[92] the affirmative admissions program could not be upheld.

Conceding the "regrettable fact. . .[of] societal discrimination in this country against various racial and ethnic groups,"[93] Justice Powell considered such discrimination "an amorphous concept of injury that may be ageless in its reach into the past,"[94] but distinguished it from "identifiable instances of past discrimination."[95] Apparently for Justice Powell, once discrimination is identified by a duly authorized governmental body, it is no longer "societal" and "amorphous" and may then be the basis for fashioning affirmative remedial measures.[96] Prior governmental findings of past discrimination

[83] Reply Brief For Petitioner at 2, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

[84] Due to the 4–1–4 division in the Court, the legal principles governing affirmative admissions cannot be decided in reference to any one opinion. Only those reasons or conclusions Justice Powell shares with four of the other Justices can be considered legally authoritative.

[85] 438 U.S. at 408 (Stevens, J., concurring in part, dissenting in part).

[86] *Id.* at 411.

[87] *Id.* at 324 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part, dissenting in part).

[88] "[A] state government may adopt race-conscious programs if the purpose. . .is to remove the disparate impact its actions might otherwise have and if. . .the disparate impact is itself the product of past discrimination, whether its own or that of society at large." *Id.* at 369.

[89] *Id.* at 369–74.

[90] *Id.* at 269.

[91] *Id.* at 307–10.

[92] Justice Powell noted possible justifications for Davis' program other than curing past statutory or constitutional violations. He indicated that a professional school might be able to justify race-conscious measures when its admissions process was based on standardized tests that were racially or culturally biased or if it could prove that the delivery of professional services to currently underserved minority communities required race-conscious responses. Davis, however, did not present sufficient evidence defending its special admissions procedures to justify its program on either of these bases. *Id.* at 306 n.43, 310–11.

[93] *Id.* at 296 n.36.

[94] *Id.* at 307.

[95] *Id.* at 308 n.44.

[96] *Id.* at 309 n.44. Justice Powell applied this analysis in Fullilove v. Klutznick, discussed in the text accompanying notes 114–18, below, and found constitutional a congressionally mandated 10 percent set-aside of funds for minority contractors.

would satisfy the condition that race-conscious measures must be subject to some form of institutional safeguard, which, according to Justice Powell, the 14th amendment requires. However, which governmental bodies are duly authorized to make the required findings, and how detailed and extensive these findings must be, remains unresolved.[97]

Although Davis was unable to justify its admissions program on this basis, Justice Powell did find the desire to obtain a "diverse" student body a permissible goal. Such a program, however, must be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight."[98] The Davis program favored racial and ethnic diversity over all other forms of diversity by means of an inflexible system that reserved a specific number of seats for minorities. Race, he ruled, can be one factor but not the sole factor considered in creating a diverse student body.[99]

Despite its ambiguities and its focus on illegal discrimination, Justice Powell's opinion leaves intact most graduate affirmative admissions programs. The result arrived at by the nine Justices permits professional schools to take those steps necessary to identify and dismantle the process of discrimination as it affects professional education.

After *Bakke*, the Court turned its attention to the legality of affirmative action as a voluntary remedy for employment discrimination.

As judicial decisions after *Griggs* increasingly clarified equal employment opportunity duties and responsibilities, those covered by equal employment opportunity laws began to find themselves in a difficult position. Whenever the numbers of minorities or women in various jobs on an employer's payroll were substantially lower than their numbers in the area's labor force, the employer and sometimes the union were subject under Title VII and other laws to lawsuits by minorities, women, and the Federal Government. This litigation could result in multimillion-dollar backpay judgments. To avoid such potential liability and to eliminate the discrimination suggested by the statistics, many employers and unions chose to implement affirmative action plans. Such plans, however, were sometimes challenged by white males claiming that the plans violated their rights under Title VII. Although conceding that an employer or union could lawfully remedy its own illegal acts against identified victims,[100] these white male litigants argued that, absent such illegal conduct, affirmative remedies were inconsistent with Title VII's antidiscrimination prohibitions.

In *United Steelworkers of America v. Weber*,[101] the Supreme Court grappled with this issue. In 1974 a private employer, Kaiser Aluminum & Chemical Corporation, and a union, United Steelworkers of America, negotiated an affirmative action plan designed to increase black participation in Kaiser's craft jobs from the preplan level of 2 percent to the level of black participation in the area's work force, which was approximately 39 percent. To accomplish this goal, the plan created an on-the-job training program that reserved 50 percent of the openings for black employees. This reservation of slots resulted in the selection of some black employees who had less seniority than some white employees who applied and were rejected for the training program. One white production employee, Brian Weber, challenged the plan.

By a 5 to 2 margin,[102] the Supreme Court ruled that the "racial preferences"[103] in the affirmative action plan were a lawful means for eliminating "old patterns of racial segregation and hierarchy."[104] As in *Bakke*, the Court in *Weber* was not confronted by allegations that the underrepresentation of minorities in craft jobs was caused by illegal actions attributable to either Kaiser or the Steelworkers union.[105] The Court cited numerous judicial and study findings of general exclusion of minorities from craft jobs by craft unions as the explanation for the

[97] See, e.g., E. Richard Larson, "Race Consciousness in Employment After *Bakke*," *Harvard Civil Rights-Civil Liberties Law Review*, vol. 14 (1979), pp. 218–19.

[98] 438 U.S. at 317.

[99] *Id.* at 307.

[100] *See, e.g.*, Franks v. Bowman Transp. Co., 424 U.S. 747 (1976).

[101] 443 U.S. 193 (1979).

[102] Justice Brennan wrote the majority opinion, joined by the same three Justices who co-authored the joint opinion in *Bakke* (White, Marshall, and Blackmun) and by Justice Stewart. Chief Justice Burger and Justice Rehnquist dissented. Justices Powell and Stevens did not participate for unexplained reasons.

[103] 443 U.S. at 200.

[104] *Id.* at 204.

[105] *Id.* at 200.

"manifest racial imbalance" in Kaiser's craft operations.[106]

The Court conceded that a literal interpretation of Title VII's prohibition against discrimination in employment based on race supports the argument that the challenged race-conscious plan illegally discriminated against white employees. But the Court decided that the purpose of the act and not its literal language determines the lawfulness of affirmative action plans. The legislative history of the act and the historical context from which the act arose compelled the conclusion, the Court held, that the primary purpose of Title VII was "to open employment opportunities for Negroes in occupations which have been traditionally closed to them."[107] The Court explained:

> It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long" constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.[108]

Minimal legal requirements—the need to identify some specific person or entity who could legally be faulted for causing discrimination—were not erected as bars to the policy objective of dismantling discriminatory processes.[109]

Having decided that Title VII encourages voluntary affirmative action by all private employers and unions, not only those legally responsible for discrimination, the Court in *Weber* then turned to the issue of the particular remedy that was used: a requirement that at least half of all employees admitted to the specially created craft training program be black until a specified percentage of all craft workers was black.[110] Its discussion of the plan in question, although brief, is instructive.

Declining to "define in detail the line of demarcation between permissible and impermissible affirmative action plans," the Court found the plan lawful, because "the plan does not *unnecessarily* trammel the interests of white employees."[111] This general characterization was then broken into three parts:

> [1] The plan does not require the discharge of white workers and their replacement with new black hires. [2] Nor does the plan create an absolute bar to the advancement of white employees; half of those trained in the program will be white. [3] Moreover, the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance. Preferential selection of craft trainees at the. . .plant will end as soon as the percentage of black skilled craft workers in the. . .plant approximates the percentage of blacks in the local labor force.[112]

Weber, therefore, permits affirmative classifications that may adversely affect the interests of white workers in limited ways when such measures are necessary to secure opportunities for those locked out of traditionally segregated jobs.

Affirmative Action Law

The decision in *Weber* was explicitly limited to private sector employers and unions covered by Title VII. Its rulings on the kinds of discrimination that they may voluntarily address ("manifest racial imbalance in traditionally segregated job categories") and the forms the remedies may take (plans may not "unnecessarily trammel" the interests of white employees) were deliberately restricted to statutory law. As a result, the Court avoided the constitutional question it had struggled with a year earlier in *Regents of the University of California v.*

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[106] *Id.* at 198 n.1. Among them was a U.S. Commission on Civil Rights report, *The Challenge Ahead, Equal Opportunity in Referral Unions* (1976).

[107] 443 U.S. at 203 (quoting remarks by Senator Humphrey).

[108] *Id.* at 204.

[109] The Equal Employment Opportunity Commission has issued comprehensive guidelines on voluntary affirmative action that embody the principles articulated in the *Weber* decision. Affirmative Action Guidelines, 29 C.F.R. §1608 (1979). These guidelines encourage those covered by Title VII (public and private employers, unions, and employment agencies) to engage in a three-step process (§1608.4) in implementing an affirmative action plan: (1) to undertake a "reasonable self-analysis" (§1608.4(a)) to identify discriminatory practices; (2) to determine if a "reasonable basis for concluding action is appropriate" exists (§§1608.3 and 1608.4(a)); and, if such a basis is found, then (3) to take "reasonable action," including the adoption of practices that recognize the race, sex, or national origin of applicants or employees (§1608.4(c)). If such procedures are followed and the plan is challenged as violating Title VII, the EEOC pursuant to special statutory powers (§1608.10) can certify the lawfulness of the plan. Such certification effectively insulates the plan from "reverse discrimination" claims.

[110] 443 U.S. at 208.

[111] *Id.* (emphasis added).

[112] *Id.* at 208–09 (citations omitted). The affirmative action plan in *Weber*, while negatively affecting some white workers, provided new opportunities for others. According to the Supreme Court, until the initiation of the plan in question, the employer hired only outside workers with several years of craft experience for its craftwork. *Id.* at 199. But for the training program created by the affirmative action plan, white workers who lacked such craft experience—including Brian Weber—would have had no opportunity to bid for craftwork.

Bakke: Are governmental actions that affirmatively use race, national origin, and sex[113] classifications constitutional under the equal protection clause of the 14th amendment?

That question was partially answered by the Court's most recent ruling supporting affirmative action. In *Fullilove v. Klutznick,*[114] the Court ruled constitutional a provision in the Public Works Employment Act of 1977 that required State or local governments, absent administrative waiver by the Department of Commerce, to use 10 percent of Federal funds granted for public works contracts to procure services or supplies from businesses owned or controlled by members of statutorily identified minority groups.[115] The 6 to 3 decision[116] removes any doubts regarding the power of Congress to mandate similar affirmative action programs where evidence supports the need for such measures.

As in *Bakke,* however, the Court was unable to agree upon constitutional standards governing affirmative action. There were three opinions forming the six-Justice majority. Chief Justice Burger's opinion, sharply limited to the distinct issue of congressional authority to pass legislation containing racial and ethnic classifications, held that congressional legislation may employ racial or ethnic criteria if it is "narrowly tailored" to remedy the present effects of past discrimination that impair or foreclose access by minorities to opportunities enjoyed by whites.[117] The opinions of Justice Powell and Justice Marshall simply applied the formulations they had previously set forth in *Bakke* and found the minority business enterprise program constitutional.[118]

The trilogy of Supreme Court affirmative action cases *(Bakke, Weber,* and *Fullilove),* despite their limits as legal precedent, shows a strong commitment to affirmative action measures designed to eliminate all forms of discrimination, *de jure* or *de facto,* illegal or legal. Only *Bakke* lacked an unequivocal outcome encouraging affirmative action plans that include "preferential" treatment and "quotas." *Bakke,* however, leaves ample room for effective affirmative admissions efforts.

Because there is no single standard governing affirmative action to which a majority of the Justices on the Supreme Court of the United States subscribe, some legal questions remain.[119] Nonetheless, seven of the nine Justices have now approved the most vigorous sorts of affirmative action, although in different contexts, for different reasons, and with different standards.[120] In addition, a very strong pattern of judicial support for affirmative action is

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[113] Classifications based on sex have never been subject to "strict" judicial scrutiny, because sex, unlike race, has not been held to be a "suspect" classification. See Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971). Consequently, explicitly sex-based classifications identified as "compensatory" (that is, designed to achieve the important governmental interest of rectifying past discrimination against women) have not been strictly scrutinized and have withstood constitutional challenge. *See, e.g.* Califano v. Webster, 430 U.S. 313 (1977); Kahn v. Shevin, 416 U.S. 351 (1974). However, where classifications based on sex have ostensibly been "compensatory," but in fact operated to disadvantage women, the classifications have been invalidated because they do not serve an important governmental interest. *See, e.g.,* Califano v. Goldfarb, 430 U.S. 199 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

[114] 448 U.S. 448 (1980).

[115] The minority groups named in the statute are: "Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." 42 U.S. §6705(f)(2) (1976 & Supp. III 1979).

[116] Chief Justice Burger's opinion was joined by Justices White and Powell; Justice Powell wrote a separate concurring opinion; Justice Marshall's concurring opinion was joined by Justices Brennan and Blackmun. Justice Stewart dissented, joined by Justice Rehnquist. Justice Stevens dissented separately.

[117] 448 U.S. 448, 473, 492 (1980).

[118] Justice Powell ruled that Congress had the authority to remedy "identified discrimination," had "reasonably concluded" that statutory and constitutional violations had been committed, and had chosen means that were equitable and reasonably necessary to redress the identified discrimination. *Id.* at 495. Justice Marshall, stating that the constitutional question "is not even a close one," found the program constitutional because it was designed to further the important governmental interest of remedying the present effects of past discrimination and used means substantially related to the achievement of this objective. *Id.* at 517.

[119] In Minnick v. California Dep't of Corrections, 157 Cal. Rptr. 260 (1979), *cert. dismissed,* 101 S. Ct. 2211 (1981), the Supreme Court of the United States had an opportunity to decide the constitutionality of a voluntary affirmative action plan instituted by a public employer. *Minnick* involved an unsuccessful challenge by white employees and their union to the affirmative action plan of the California Department of Corrections that assigned a "plus" to female and minority employees competing for promotion or transfer in order to overcome a history of discrimination within the department. The Court declined to hear the case because there were ambiguities in the record and because significant developments in the law had occurred since the lower court's ruling in the case had occurred prior to the *Bakke* decision. *Id.* at 2223.

[120] Four Supreme Court Justices in *Bakke* (Brennan, White, Marshall, and Blackmun) have found constitutional nonstigmatic quotas, ratios, set-asides, and preferential treatment based on race that remedy the present effects of past discrimination. *See* text accompanying notes 87–89, above. Justice Stewart joined these same four Justices in *Weber* to hold voluntary affimative action plans lawful in private sector employment. *See* text accompanying notes 102–112, above. A sixth Justice, Powell, approves of explicit racial classifications that are responsive to duly authorized governmental findings of statutory or constitutional civil rights violations. *See* text accompanying notes 90–99, above. Finally, Chief Justice Burger ruled in *Fullilove* that Congress has

emerging in lower court opinions, particularly since *Weber.*[121]

Civil rights laws have not been set up as obstacles to tearing down the very process of discrimination they were enacted to dismantle. They have excluded only a narrow range of action (excessively rigid programs taken without adequate justification) from the scope of permissible affirmative activities. The current state of the law provides policymakers, both public and private, the flexibility needed to reach sensible solutions.

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the latitude to enact "narrowly tailored" racial classifications to eliminate the present effects of past discrimination. See text accompanying note 117, above.

[121] Setser v. Novack Investment Co., 657 F.2d 962 (8th Cir. 1981) (en banc); Local Union No. 35 of Int'l. Bhd. of Elec. Workers v. City of Hartford, 625 F.2d 416 (2d Cir. 1980), *cert. denied,* 101 S.Ct. 3148 (1981); Detroit Police Officers' Ass'n. v. Young, 608 F.2d 671 (6th Cir. 1979), *cert. denied,* 101 S.Ct. 3079 (1981); Baker v. City of Detroit, 483 F. Supp. 930 (E.D. Mich. 1979); Tangren v. Wackenhut Servs., Inc., 480 F. Supp. 539 (D. Nev. 1979) *aff'd,* No. 79-3796 (9th Cir. Oct. 5, 1981); Price v. Civil Serv. Comm'n., 161 Cal. Rptr. 475, 604 P.2d 1365 (1980), *cert. dismissed as moot,* 101 S.Ct. 57 (1980); Chmill v. City of Pittsburgh, 488 Pa. 470, 412 A.2d 860 (1980); Maehren v. City of Seattle, 92 Wash.2d 480, 599 P.2d 1255 (1979), *cert. denied,* 101 S.Ct. 3079 (1981); McDonald v. Hogness, 92 Wash. 431, 598 P.2d 707 (1979), *cert. denied,* 445 U.S. 962 (1980).

Part C

The Remedy: Affirmative Action

The introduction to this statement defined affirmative action to mean active efforts that take race, sex, and national origin into account for the purpose of remedying discrimination. It distinguished affirmative action plans, which use a wide range of antidiscrimination measures that may or may not take race, sex, and national origin into account, from the specific measures commonly occurring within such plans that implicitly or explicitly use race, sex, and national origin as criteria in decisionmaking.

The first part of this statement described discrimination as a process that perpetuates itself through the interaction of attitudes and actions of individuals and organizations. These beliefs and behaviors shape and are shaped by general social structures, such as education, employment, housing, and government. These elements together form processes that produce marked economic, political, and social inequalities between white males and the rest of the population. These inequalities, in turn, feed into the process that produced them by reinforcing discriminatory attitudes and actions.

The existence of this process makes truly neutral decisionmaking virtually impossible. The conduct of employers, guidance counselors, bankers, and others discussed in Part A is but one example of how decisions that seem to be neutral, and may even be motivated by good intentions, may nonetheless result in unequal opportunities for minorities and women. These "neutral" acts become part of a cyclical process that starts from, is evidenced by, and ends in continuing unequal results based on race, sex, and national origin.

The second part of this statement then explained that civil rights law in some cases requires and in other cases permits a full range of remedial measures that take race, sex, and national origin into account. Civil rights law facilitates rather than obstructs those affirmative efforts needed to dismantle discriminatory processes.

The final part of this statement applies its problem-remedy approach to some of the major concerns voiced by opponents and proponents of affirmative action. This approach presents a format for productive discussion of these concerns. Its aim is to help distinguish the proper use of affirmative action plans and measures that take race, sex, and national origin into account from their abuse.

Self-Analysis, Statistics, and Affirmative Action Plans

The starting point for affirmative action plans within the problem-remedy approach is a detailed examination of the ways in which the organization currently operates to perpetuate discriminatory processes. Treatment follows, not precedes, diagnosis.

Such an analysis identifies, as precisely as possible, the individuals, policies, practices, and procedures that work to support discrimination. Without that thorough investigation, an affirmative action plan risks bearing no relationship to the causes of discrimination and can become merely a rhetorical endorsement of equal opportunity that compiles aimless statistics and patronizes minorities and women. Such plans frequently prove counterproductive by arousing hostility in those otherwise sympathetic toward

corrective efforts. But when based on a rigorous analysis identifying the activities that promote discrimination, affirmative action plans are comprehensive and systematic programs that use the tools of administration to dismantle discriminatory processes.

This examination is likely to be more accurate when performed by persons with an intimate knowledge of the organization and complete access to necessary information. Voluntary self-analysis, therefore, is the preferred means for uncovering discrimination.

In recent years, statistical procedures interpreting data based on race, sex, and national origin have been the dominant means for detecting the existence of discrimination.[1] Their use is premised on the idea that the absence of minorities and women from the economic, political, and social institutions of this country is an indicator that discrimination may exist. A useful and increasingly refined method for self-analysis, such procedures have also been subject to misunderstanding.

One such misunderstanding confuses statistical underrepresentation of minorities and women with discrimination itself. Such data are the best available warning signals that discriminatory processes may be operating. Statistics showing a disproportionately small number of minorities and women in given positions or areas strongly suggest that a discriminatory process is at work. But such *quantitative* manifestations of discrimination raise questions rather than settle them.[2] They call for further investigation into the *qualitative* actions and attitudes that produce the statistical profile.

Another misunderstanding of statistics has led to the rigid demand for statistically equal representation of all groups without regard to the presence or possible absence of discriminatory processes. Many people frequently leap from the misconception that unequal representation *always* means that discrimination has occurred to the correspondingly overstated position that equal representation is *always* required so that discrimination may be eliminated. This position reduces the use of statistics in affirmative action plans (in the form of numerical targets or "goals") to a "numbers game" that makes manipulation of data the primary element of the effort. It changes the objectives of affirmative action plans from dismantling discriminatory processes to assuring that various groups receive specified percentages of resources and opportunities. Such misunderstandings of statistics not only short circuit the critical task of self-analysis, but also imply the need for a remedy without identifying the discriminatory problem.

Once the activities that promote discrimination are identified, the task is then to put into effect measures that work against these discriminatory processes. As the first part of this statement has shown, discriminatory attitudes and actions can form patterns that reinforce discrimination. In such situations, sporadic or isolated measures that implicitly or explicitly use race, sex, and national origin as criteria in decisionmaking may make for some change, but are unlikely to be successful in the long run. An affirmative action *plan*—a systematic organizational effort that comprehensively responds to the discriminatory problems identified by the analysis of the organization's operations—is required. That plan will set realistic objectives for dismantling discriminatory processes as they occur within the organization. It will include, as methods for achieving these objectives, antidiscrimination measures, some of which will, and others which will not, take account of race, sex, and national origin.

The basic elements of an affirmative action plan include:

- The organization's written commitment to providing equal opportunity;
- Dissemination of this policy statement within the organization and to the surrounding community;
- Assignment to senior officials of adequate authority and resources to implement the affirmative action plan;
- Identification of areas of underutilization of minorities and women and analysis of the discriminatory barriers embedded in organizational decisionmaking;
- Specific measures designed to overcome the causes of underutilization and remove discriminatory barriers;

[1] Gathering statistical data by race, sex, and national origin, which is almost universally practiced and well-established in the law, is a critical element in compliance efforts and program planning. For a full discussion on the collection and use of racial and ethnic data in Federal assistance programs and their legality, *see* U.S., Commission on Civil Rights, *To Know or Not to Know* (1973).

[2] The use of numerical evidence as a sign of discrimination and not discrimination itself is well-established. *See* text accompanying notes 4–21 in Part B.

- Monitoring systems to evaluate progress and to hold officials accountable for progress or the lack thereof; and
- Promotion of organizational and community support for the objectives of the plan by consolidating advances as they are achieved.[3]

In the employment context, the design and implementation of affirmative action plans involve unions as well as employers.[4] Unions have the authority to insist that employers bargain in good faith over the terms and conditions of employment (such as wages, promotion procedures, training, transfers, and seniority)[5] that affirmative action plans can affect. If unions exercise this collective-bargaining power to press for or acquiesce in discriminatory provisions, or to block nondiscriminatory ones, they may be liable to injured employees.[6] To encourage unions to use their power actively to oppose discrimination and to support affirmative action, the Equal Employment Opportunity Commission has adopted a policy resolution on collective bargaining.[7] That resolution commits EEOC to take into consideration, when deciding who to sue for discriminatory employment practices, the good-faith efforts of unions and employers to eliminate discrimination through collective bargaining.

Unions have the right to request and obtain from employers information on hiring, promotions, and

[3] Both the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance Programs of the Department of Labor have issued sound guidance materials to employers on how to conduct a self-analysis and develop affirmative action plans. U.S., Equal Employment Opportunity Commission, *Affirmative Action and Equal Employment: A Guidebook for Employers* (1974); U.S., Department of Labor, Office of Federal Contract Compliance, *Federal Contract Compliance Manual* (1979). The appendix to this statement also lists guidelines for designing, implementing, monitoring, and evaluating affirmative action plans in employment.

[4] This discussion focuses on the role of nonreferral unions as opposed to referral unions. The U.S. Commission on Civil Rights has published a study on the impact of referral unions on the employment of minorities and women. In that study, it was noted that referral unions "directly influence entry into a job or trade. . . .By referring individuals to employers for hiring and by selecting individuals for apprenticeship and membership, many referral unions directly determine the size of the labor force, the qualifications required by workers, and the selection of workers." U.S., Commission on Civil Rights, *The Challenge Ahead, Equal Opportunity in Referral Unions* (1976), p. 15 (emphasis omitted). Nonreferral unions, on the other hand, "have no direct influence, and perhaps little or no indirect influence on hiring." Such unions, however, "can have considerable influence on policies and practices that affect. . .the job advancement of workers already hired." This influence is exercised "through contract negotiations over wages, hours, and other conditions of employment; union policies toward grievance procedures; and union policies exercised during the day-to-day give-and-take that generally characterizes the union-company relationship." U.S., Commission on Civil Rights, *The Role of Nonreferral Unions in Promoting Equal Employment Opportunity*, Preface, forthcoming (hereafter cited as *Role of Nonreferral Unions*).

[5] *See Role of Nonreferral Unions*, pt. I, chap. 3.

[6] Ibid., pt. II, chap. 3. The law in the area of union liability for employer discrimination is still developing. The trend is toward imposing on unions an affirmative duty to end an employer's discriminatory practices. Employment discrimination laws require unions to take steps to encourage employers to eliminate discriminatory practices, and a union will be held liable for the natural consequences of a collective-bargaining agreement it signs. *See, e.g.*, Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1381 (5th Cir. 1974). One court has held that a union's Title VII obligation not to discriminate against the employees it represents is broader than simply refusing to sign overtly discriminatory agreements. Macklin v. Spector Freight Sys., Inc., 478 F.2d 979, 989 (D.C. Cir. 1973). Other courts have found a union's mere acquiescence in the discriminatory acts of an employer to be sufficient to subject the union to liability under Title VII. *See, e.g.*, EEOC v. Detroit Edison Co., 515 F.2d 301, 314 (6th Cir. 1975), *vacated on other grounds*, 431 U.S. 951 (1977); Patterson v. American Tobacco Co., 535 F.2d 257, 270 (4th Cir. 1976), *cert. denied*, 429 U.S. 920 (1976).

Confusion as to the legal responsibilities of unions may result from a unique relationship between nonreferral unions and employment practices. Such unions are liable under Title VII if they cause or attempt to cause discrimination. The finding of liability consists of a two-step process. First, the union must act or fail to act; and, secondly, the discriminatory practice must result from that action or passivity. Signing a collective-bargaining agreement containing a discriminatory provision has been found to be a sufficient connection to discrimination to make the union liable. Johnson v. Goodyear Tire and Rubber Co., *supra;* Parson v. Kaiser Aluminum and Chem. Corp., 575 F.2d 1374 (5th Cir. 1978), *cert. denied*, 441 U.S. 968 (1979); *see also* Donnell v. General Motors Corp., 576 F.2d 1292 (8th Cir. 1978) (union's role in ratifying rules and regulations governing employer-administered apprenticeship program could be enough to compel a finding of union liability). Once liability has been established, the good faith bargaining efforts of the union will be taken into account in determining the extent of the union's liability for its part in the discrimination. Burwell v. Eastern Air Lines, Inc., 458 F. Supp. 474, 502 (E.D. Va. 1978), *modified on other grounds*, 633 F.2d. 361 (4th Cir. 1980), *cert. denied*, 101 S. Ct. 1480 (1981). In addition, confusion may result from the judicial attempt to reconcile the two different regulatory approaches underlying Title VII and the National Labor Relations Act (NLRA). The NLRA and labor law generally are concerned with the bargaining process in determining liability, whereas Title VII is more concerned with the result of the bargaining process regardless of motive. For discussions of case law on union liability under Title VII in the context of employer discrimination, *see Role of Nonreferral Unions*, pt. II, chap. 2 and chap. 3; David O. Simon, "Union Liability Under Title VII for Employer Discrimination," *Georgetown Law Journal*, vol. 68 (1980), p. 959; Note, "Union Liability for Employer Discrimination," *Harvard Law Review*, vol. 93 (1979), p. 702.

[7] U.S., Equal Employment Opportunity Commission, "Background Paper and Resolution to Encourage Voluntary Affirmative Action in Collective Bargaining," 65 DLR D-1 (Apr. 2, 1980). This resolution is discussed in *Role of Nonreferral Unions*, pt. II, chap. 3.

job classification arrayed by race, sex, and national origin.[8] Union members have intimate, firsthand knowledge of plant practices. Unions, thus, are in an ideal position to help develop and implement affirmative action plans that will root out all manifestations of discrimination. Lacking employer cooperation, unions can use their considerable financial resources and legal expertise to inform employees of their legal rights and assist them in bringing legal actions.[9]

Goals, Quotas, and "Preferential Treatment"

As a Nation, we are committed to making our differences in skin color, gender, and ancestry sources of strength and beneficial diversity, not grounds for oppression or mindless uniformity. Consequently, agreement on the need to identify discrimination based on race, sex, and national origin and to eliminate it through an affirmative action plan is frequently, and often easily, reached. Few fair-minded persons argue with the objective of increasing the participation of minorities and women in those areas from which they historically have been excluded. Heated controversy occurs, however, over particular methods employed in affirmative action plans to achieve this common objective. The focal point of the controversy is usually those particular measures within affirmative action plans that explicitly take race, sex, and national origin into account in numerical terms. Those measures are popularly referred to as "goals," "quotas," or "preferential treatment."

These terms have dominated the debate over affirmative action, often obscuring issues rather than clarifying them. Many discussions fail to make the necessary distinctions, explained in the introduction to this statement, among affirmative action *plans*, the *measures* they implement that may use race, sex, and national origin as positive criteria in decisionmaking and numerical *goals* that may help assess the effectiveness of the plans' measures. The problem-remedy approach, the Commission believes, can help reorient this debate. It makes clear that the discrimination that exists within an organization forms the basis for the antidiscrimination measures that are implemented through an affirmative action plan. The problem-remedy approach stresses the nature and extent of discrimination and what measures will work best to eliminate such discrimination, not what word to use to describe those measures.

The civil rights community has labored hard to define the points at which measures that take account of race, sex, and national origin within affirmative action plans are essential or become objectionable. There is widespread acceptance of such measures as undertaking recruiting efforts, establishing special training programs, and reviewing selection procedures. On the other hand, firing whites or men to hire minorities or women, and choosing unqualified people simply to increase participation by minorities and women, are universally condemned practices. With respect to measures that do not fall neatly on either end of this spectrum, however, distinctions are far more difficult to draw. These distinctions are not made easier by calling acceptable measures "goals" and objectionable ones "quotas."

For example, as part of an affirmative action plan, an employer could use any one or all of the following: extensive recruiting of *qualified* minorities and women; revising selection procedures so as not to exclude *qualified* minorities and women; considering race, sex, and national origin as one of a number of positive factors in choosing among *qualified* applicants; specifying that among *qualified* applicants a certain ratio or percentage of minorities and

[8] Westinghouse Electric Corp., 239 NLRB No. 19 (1978), 1978–79 CCH NLRB 15,191, *enf'd sub nom.* I.U.E. v. Westinghouse Electric Corp., 90 CCH Lab. Cas. par. 12,386 (D.C. Cir. 1980).

[9] One union, the International Union of Electrical, Radio, and Machine Workers (I.U.E.), has adopted a "Title VII Compliance Program" that stresses the elimination of systemic discrimination. *See* Winn Newman and Carole W. Wilson, "The Union Role in Affirmative Action," *Labor Law Journal*, vol. 32 (1981), pp. 323, 326–27. The I.U.E. program consists of the following elements: (1) an educational program for both staff and members; (2) a systematic review of the number and status of minority members and women at each plant; (3) a systematic review of collective-bargaining contracts and plant practices to determine whether specific kinds of discrimination exist; and (4) requests to employers for detailed information broken down by race, sex, and national origin, relating to hiring (including the job grade given to each new hire), promotion and upgrading policies, initial assignments, wage rates, segregation of job classifications and seniority, copies of the employer's affirmative action plan and work force analysis, and copies of information concerning the status of all charges filed against it under the Equal Pay Act, Title VII, Executive Order 11246, and State fair employment practices laws. If data indicate there has been discrimination, the I.U.E.: (1) requests bargaining with employers to eliminate the illegal practices; (2) files NLRB refusal-to-bargain charges against uncooperative employers; and (3) files Title VII charges and lawsuits under Title VII and complaints under Executive Order 11246.

women to white males will be selected. Similar measures taking race, sex, and national origin into account could be undertaken by colleges and universities in their admissions programs.

These actions could all be taken to reach designated numerical objectives or goals set by an affirmative action plan. Although the establishment of goals, and timetables to meet them, provides for accountability by setting benchmarks for success, their presence or absence does not aid in choosing which measures to use to achieve the objective of equal opportunity. The critical question is, Which measures taking race, sex, and national origin into account should be used in which situations to reach the designated goals? The answer to this question, the Commission believes, is best found by analyzing the nature and extent of the discrimination confronting the organization.

Obviously, some selection procedures, such as those ordered by the courts that among qualified applicants choose a specific percentage of minorities and women to white males, have characteristics of a quota. But attaching this label to measures that explicitly use race, sex, and national origin as criteria in decisionmaking does not render them illegal. The preceding section of this statement explained that the lower courts have repeatedly ordered percentage and ratio selection techniques to remedy proven discrimination.[10] In *Weber* and *Fullilove*, the Supreme Court of the United States approved of measures that cannot easily evade the description of quotas.[11] In *Bakke*, four of nine Justices approved a medical school's "set-aside" program, arguing that any system that uses race, sex, or national origin as a factor in selection procedures is constitutionally no different from such a quota system.[12] A fifth Justice indicated that such a program would be legal under circumstances not present in that case.[13] Rigorous opposition to all quotas, therefore, does not aid in distinguishing when to use, or not use, these kinds of legally acceptable, and sometimes required, affirmative remedies.

A debate that hinges on whether a particular measure is a goal or a quota is unproductive, legally and as a matter of policy. It confuses the means for assessing progress under an affirmative action plan (goals) with the measures (quotas) that some, but not all, plans use to reach these goals. It loses sight of the problem of discrimination by arguing over what to label remedial measures. Whichever measures taking race, sex, and national origin into account may be included within affirmative action plans—from recruiting to openly stated percentage selection procedures, with or without specific numerical targets—depends, as a matter of law and policy, on the factual circumstances confronting the organization undertaking the affirmative action plan. The problem-remedy approach urges using the nature and extent of discrimination as the primary basis for deciding among possible remedies. The measure that most effectively remedies the identified discriminatory problem should be chosen.

By broadening the present field of competition for opportunities, affirmative action plans, like all antidiscrimination measures, function to decrease the privileges and prospects for success that some white males previously, and almost automatically, enjoyed. For example, a graduate school with a virtually all-white, male student body that extensively recruits minorities or women is likely to fill openings that otherwise would have gone to white men with minorities or women. A bank with its base in the white community that invests new energies and funds in minority housing and business markets necessarily has less available capital to channel to whites. A police force that has excluded minorities or women in the past and substitutes new promotion criteria for seniority will promote some recently hired minorities or women over more senior white male police officers.

Such affirmative efforts are easier to implement when new resources are available.[14] Additional openings, increased investment funds, and more jobs add to everyone's opportunities, and no one—neither white men nor minorities and women—has any

[10] See notes 60 and 61 in Part B.

[11] See text accompanying notes 101–118 in Part B.

[12] Regents of the University of California v. Bakke, 438 U.S. 265, 378 (1978) (joint opinion of Brennan, Marshall, White, and Blackmun, JJ.), discussed in text accompanying notes 88–89.

[13] *Id.* at 272 (opinion of Powell, J.), discussed in text accompanying notes 90–99 in Part B.

[14] For example, in United Steelworkers of America v. Weber, discussed in Part B, "Voluntary Affirmative Action," the employer had hired for its craft jobs only workers with several years of experience doing such work. This hiring practice precluded its present employees who lacked these skills, which were nearly all of them, from obtaining these higher paying positions. 443 U.S. at 198. As part of an affirmative action plan, the employer agreed to pay the cost of an on-the-job training program, thereby opening craft jobs to white as well as minority employees.

better claim to these new resources than anyone else. Whether new resources become available, remain constant, or even diminish, however, decisions must be made. Frequently, the basic choice confronting organizations is between present activities that through discriminatory processes prefer white men and affirmative action plans that consciously work to eliminate such discrimination.

The problem-remedy framework does *not* suggest that the purpose of affirmative action plans is to "prefer" certain groups over others. When discrimination is a current that carries along all but those who struggle against it, there can be no true "color blindness" or "neutrality." In such contexts, all antidiscrimination measures, whether or not they take race, sex, or national origin into account, will help some individuals and hinder others. To criticize such efforts on the ground that they constitute "preferential treatment" inaccurately implies unfairness by ignoring the need to dismantle processes that currently allocate opportunities discriminatorily.

Measures that take race, sex, and national origin into account intervene in a status quo that systematically disfavors minorities and women in order to provide them with increased opportunities. Experience has shown that in many circumstances such opportunities will not result without conscious efforts related to race, sex, and national origin. Although it is appropriate to debate which kinds of "preferential treatment" to use under what circumstances, the touchstone of the decision should be how the process of discrimination manifests itself and which remedial measures promise to be the most effective in dismantling it.

What distinguishes such "preferential treatment" attributable to affirmative action plans from quotas used in the past[15] is the fact that the lessened opportunities for white males are incidental, temporary, and not generated by prejudice against those who are excluded. The purpose of affirmative action plans is to eliminate, not perpetuate, practices stemming from ideas of racial, gender, and ethnic inferiority or superiority. Moreover, affirmative action plans occur in situations in which white males as a group already hold powerful positions. Federal law, Federal policy, and this Commission reject affirmative action when used, as were quotas in the past, to stigmatize and set a ceiling on the aspirations of entire groups of people.

Support for affirmative action to dismantle the process of discrimination does not mean insensitivity to the interests of white males. To the greatest extent possible, the costs of affirmative action should be borne by the decisionmakers who are responsible for discrimination, not by those who played no role in that process. In fashioning remedial relief for minorities and women, the courts have tried to avoid penalizing white male workers who were not responsible for the challenged discrimination. For example, rather than displace white male employees who were hired or promoted through discriminatory personnel actions, courts have directed that the victims of the discrimination be compensated at the rate they would have earned had they been selected, until such time as they can move into the position in question without displacing the incumbent.[16] The Supreme Court has noted the availability of this "front pay" remedy as one way of "shifting to the employer the burden of the past discrimination."[17]

In addition, the law prohibits "*unnecessarily* trammeling" the interests of white males,[18] thereby protecting the existing status of white males (as distinguished from their expectations based on past

[15] *See, e.g.*, Nathan C. Belth, *A Promise To Keep: A Narrative of the American Encounter with Anti-Semitism* (New York: Times Books, 1979), pp. 96–110; Benjamin R. Epstein and A. Forster, *"Some of My Best Friends. . ."* (New York: Farrar, Straus, and Cudahy, 1962), pp. 143–58, 169–83, 220–22.

[16] Patterson v. American Tobacco Co., 535 F.2d 257, 269 (4th Cir. 1976), *cert. denied*, 429 U.S. 920 (1976), *remand aff'd in part, rev'd in part*, 586 F.2d 300 (4th Cir. 1978), *later appeal*, 634 F.2d 744 (4th Cir. 1978), *cert. granted*, 101 S.Ct. 3078 (1981). *See also*, Fitzgerald v. Sirloin Stockad , Inc., 624 F.2d 945, 956–57 (10th Cir. 1979) (court approved award of front pay as compensation in lieu of reinstatement to victim of sex discrimination); Hill v. Western Electric Co., Inc., 596 F.2d 99, 104 (4th Cir. 1979) (employees subjected to discrimination in job assignments on basis of race and sex were entitled to back and front pay provided they could show deprivation by reason of such discrimination).

[17] Franks v. Bowman Transportation Co., 424 U.S. 747, 777 n.38 (1976). *See also* McAleer v. American Tel. & Tel. Co., 416 F. Supp. 437 (D.D.C. 1976) (male employee who would have been promoted except for his gender because of court-approved affirmative action plan was not entitled to remedy of promotion, but was entitled to recover damages). *But see* Telephone Workers Union v. N.J. Bell Telephone Co., 450 F. Supp. 284, 298 (D.N.J. 1977) (court refrains from granting front pay). This future-oriented form of monetary compensation is supplementary to backpay, which compensates victims of unlawful discrimination in an effort to restore the victim to the position he or she would have been were it not for the unlawful discrimination. When a court awards backpay, the employer pays the victim for wages wrongfully denied in the past.

[18] United Steelworkers of America v. Weber, 443 U.S. 193, 208 (1979) (emphasis added), discussed in Part B, "Voluntary Affirmative Action."

practices) from arbitrary affirmative action plans. Thus, there may be situations where minorities and women do not obtain the positions they might otherwise hold, because doing so would require displacing whites from their present jobs.[19] On the other hand, certain situations may require disappointing the expectations of some individual white males.[20]

This balance between the national interest in eliminating discrimination against minorities and women and the interests of individual white men is especially difficult when employers lay off workers. Historically, the groups hit first and hardest by recessions and depressions have been minorities and women. They were the last hired and the first fired. Today, employment provisions that call for layoffs on the basis of seniority can have the same result. Minorities and women will tend to have the lowest seniority and be laid off first and recalled last in companies that excluded them in the past. To break this historical cycle and prevent recently integrated work forces from returning to their prior segregated status, this Commission has recommended, and at least one court has approved, a proportional layoff procedure.[21] Under this system, separate seniority lists for minorities, women, and white males are drawn up solely for layoff purposes, and employees are laid off from each list according to their percentages in the employer's work force.[22] There are other methods that would preserve the opportunities created by affirmative action plans with less impact on white male workers, such as work sharing, inverse seniority systems, and various public policy changes in unemployment compensation.[23] If none of these or similar alternatives are pursued, the use of standard "last hired, first fired" procedures will mean that opportunities laboriously created in the 1970s may be destroyed during hard times in the 1980s.

In the short run, some white men will undoubtedly feel, and some may in fact be, deprived of certain opportunities as a result of affirmative action plans. Our civil rights laws, however, are a statement that such imagined or real deprivations cannot be allowed to block efforts to dismantle the process of discrimination.

Although affirmative action plans may adversely affect particular white men as *individuals,* they do not unfairly burden white men *as a group.* For example, Alan Bakke may have been denied admission to medical school because of an affirmative action program, but nearly three-quarters of those admitted were white.[24] Affirmative action plans reduce the share of white men as a group to what it would roughly be had there been no discrimination against minorities and women. In this sense, an affirmative action plan simply removes the unfair advantages that white males as a class enjoy due to past discrimination. Emphasis on the expectations of individual white men under the status quo downplays their position as a group and the discrimination experienced by minorities and women. Such emphasis also overlooks the fact that affirmative action plans often produce changes in our institutions that are beneficial to everyone, including white males. In eliminating the arbitrariness of some qualification standards, affirmative action plans can permit previously excluded white men to compete with minorities and women for jobs once closed to them all.[25] Court-ordered desegregation of school systems—which can be considered affirmative action plans for school systems—has revealed shortcomings in the

[19] "Bumping" relief (the replacing of white male workers with minority or women workers) may not be used to remedy past discrimination. *See, e.g.,* Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir. 1976), *cert. denied,* 429 U.S. 920 (1976), *remand aff'd in part, rev'd in part,* 586 F.2d 300 (4th Cir. 1978), *later appeal,* 634 F.2d 744 (4th Cir. 1978), *cert. granted,* 101 S.Ct. 3078 (1981).

[20] *See* Franks v. Bowman Transportation Co., 424 U.S. 747, 774–77 (1976), and text accompanying notes 62–70 in Part B.

[21] U.S., Commission on Civil Rights, *Last Hired, First Fired: Layoffs and Civil Rights* (1977) (hereafter cited as *Last Hired, First Fired;*) Tangren v. Wackenhut Servs., Inc., 480 F. Supp. 539 (D. Nev. 1979), *aff'd* No. 79-3796 (9th Cir. Oct. 5, 1981).

[22] Because "last hired, first fired" provisions generally are legal (see text accompanying note 76 in Part B), proportional layoffs, while permissible, are not required by law. *But see* U.S., Equal Employment Opportunity Commission, "Layoffs and Equal Employment Opportunity," 45 Fed. Reg. 60832 (Sept. 12, 1980).

[23] Under work-sharing agreements, employees agree to divide work and receive a reduced salary in an effort to avoid or minimize layoffs. Inverse seniority permits the senior person rather than the junior person on the job to accept a temporary layoff with compensation and the right to return to the job at a later date. Changes in unemployment compensation include supplementing the wages of employees who work less than the normal 5-day workweek with tax-exempt unemployment insurance benefits for the fifth day. For a discussion of these methods of minimizing or avoiding layoffs, see *Last Hired, First Fired,* pp. 49–71.

[24] Regents of the University of California v. Bakke, 438 U.S. 265, 276 n.6 (opinion of Powell, J.)

[25] *See, e.g.,* note 14 above; and Griggs v. Duke Power Co., discussed in the text accompanying notes 14–20 in Part B.

education of all students and has led to improvements.[26] Employers have used the self-analysis required by affirmative action plans as a management tool for uncovering and changing general organizational deficiencies.[27]

Other Concerns

Serious civil rights enforcement efforts by the executive branch of the Federal Government have only been made during the last decade.[28] These efforts have been as controversial as the civil rights laws themselves. Those subject to regulation and those whom the regulations are designed to protect have both voiced criticism and concern about Federal enforcement procedures. In the area of employment, for example, employers complain that Federal agencies administering equal employment opportunity laws and regulations impose burdensome, duplicative, and inconsistent requirements; fail to provide technical assistance; and hire enforcement officials who are often uncooperative, hostile, and unaware of the problems of employers.[29] Community representatives find Federal agencies ineffective in achieving compliance, inadequate in informing citizens clearly and precisely how to avail themselves of the protection of the laws, and lacking adequate staff and resources.[30] The serious problems marring the Federal civil rights enforcement effort are matters of great concern. This statement aims to clarify the conceptual framework that guides these sometimes haphazard enforcement activities. By sharpening necessary distinctions, this statement seeks to eliminate needless friction and misunderstanding among those involved and, consequently, to improve Federal civil rights enforcement efforts.

Perhaps the most serious charge against affirmative action is that it substitutes numerical equality for traditional criteria of merit in both employment and university admissions. Neither the Nation's laws nor this Commission calls for the lowering of valid standards. Affirmative action plans often require, however, the examination and sometimes the discarding of standards that, although traditionally believed to measure qualifications, in fact are not demonstrably related to successful performance as an employee or a student.[31] Whether conscious or unconscious, overt or subtle, intentional or unintentional, the use of such standards may deny opportunities to minorities or women, as well as others, for reasons unrelated to real merit.

It is sometimes mistakenly believed that civil rights law requires the selection of lesser qualified minorities and women over white men. The Supreme Court of the United States has held that Title VII of the Civil Rights Act of 1964 does not require that minorities and women receive "preferential treatment," only that they not be victimized by illegal discrimination.[32] Thus, if two applicants, one a minority or woman and the other a white man are, in fact, equally qualified for an available position, there is no general legal requirement that the employer *must* select the minority or woman.[33] Employment decisions based upon an evaluation of true merit are permissible even when they have an adverse impact on minorities and women. However, just as standards unrelated to job performance cannot be used to exclude minorities and women, restrictive criteria not applied to white men cannot be imposed on minorities or women. Under the Federal contractor compliance program, for example, an employer cannot now require that minority and women applicants possess qualifications that were not previously required of incumbent white men.[34] Nevertheless, less qualified persons need not be selected over persons who are, in fact, more qualified for a specific job.[35]

Civil rights law does not prohibit all arbitrary selection procedures. Unless the intent is to discrimi-

[26] *See* U.S., Commission on Civil Rights, *Fulfilling the Letter and Spirit of the Law* (1976), pp. 152–53.

[27] *See, e.g.*, G.C. Pati and C.W. Reilly, "Reversing Discrimination: A Perspective," *Labor Law Journal*, vol. 29 (1978), p. 20.

[28] U.S., Commission on Civil Rights, *Civil Rights: A National, Not a Special Interest* (1981), p. 34. In 1973 the Commission found that the Federal Government's civil rights enforcement efforts were "so inadequate as to render the laws practically meaningless." *The Federal Civil Rights Enforcement Effort–A Reassessment* (1973), p. 1.

[29] *See* Report of 13 State Advisory Committees to the U.S. Commission on Civil Rights, *Promises and Perceptions: Federal Efforts to Eliminate Employment Discrimination Through Affirmative Action* (1981), pp. 16, 28, and 34.

[30] Ibid., pp. 14, 28.

[31] *See* text accompanying notes 14–20 in Part B.

[32] Texas Department of Community Affairs v. Burdine, 101 S.Ct. 1089 (1981).

[33] *Id.* at 1097.

[34] 41 C.F.R. §60–2.24(f)(5) (1980), which states in part: "Neither minority nor female employees should be required to possess higher qualifications than those of the least qualified incumbent."

[35] The *Federal Contract Compliance Manual* requires Department of Labor investigators to determine the reason why minorities and women who possessed qualifications equal to or greater than the least qualified nonminority or male selected were rejected. U.S., Department of Labor, Office of Federal Contract Compliance Programs, *Federal Contract Compliance Manual* (1979), §§3–190.5e and 3–190.6a4.

nate, arbitrary selection standards (those that do not measure necessary skills) are unlawful only if they build on past discrimination against minorities and women or the discriminatory acts of others. In *Griggs*,[36] for example, the North Carolina employer required as conditions of employment as a "coal handler" that job applicants pass written tests and have a high school diploma. As a result of segregated and inferior public education, relatively few blacks could meet these qualifications. The Court struck down the job requirements because they bore no relationship to job performance *and* they operated to exclude blacks victimized by *de jure* school segregation.

A more difficult issue arises when standards that accurately measure necessary skills disqualify more minorities and women than white men. Because of the pervasive and cumulative effects of discriminatory processes, few minorities and women may possess the experience or skills that certain positions demand. These valid standards, just like invalid ones, reinforce the economic, social, and political disadvantages caused by the discriminatory acts of others. In such situations, civil rights law does not require the selection of unqualified minorities and women. It does, however, encourage organizations and institutions to restructure jobs and develop new standards that are equally related to successful performance, but do not disproportionately exclude minorities and women,[37] or to develop training programs that give minorities and women opportunities denied them by other sectors of our society.[38] Affirmative action, therefore, while leading to the dismantling of the process of discrimination, need not and should not endanger valid standards of merit.

Another major distortion of the concept of affirmative action results from the faulty implementation of affirmative action plans.[39] University officials, for example, have inaccurately informed white male candidates, rejected for academic positions on the basis of their own qualifications, that their rejection was due to affirmative action requirements that had forced the university to select less qualified minorities or women.[40] Minorities have been urged to accept promotions to positions for which they lack the necessary skills, in which they then fail, and they are then blamed for their failure.[41] Minority or female "tokens" have been placed in situations where they face open hostility or lack of basic support, and the resulting isolation causes them to quit, which the employer then uses as a basis for not hiring more minorities and women.[42]

Affirmative action plans, regardless of how well they are implemented, are viewed by some as perpetuating the belief of minority and female inferiority. These critics contend that measures that take race, sex, and national origin into account, no matter how benign their purpose, "stigmatize" minorities and women in ways similar to previous invidious labels of inferiority, unfitness, and helplessness. According to its critics, affirmative action casts doubt on the legitimacy of the achievements of women and minorities by implying that these accomplishments were not earned by hard work and on the basis of merit.[43]

These alleged "stigmas," however, do not result from the concept of affirmative action itself. They predate the concept. They are caused by the prejudiced attitudes and offensive stereotypes our history of discrimination has produced. Arguments that affirmative action plans stigmatize minorities and women necessarily accept rather than contest existing discriminatory beliefs. Affirmative action plans, by disrupting the status quo that currently perpetuates stigmatizing attitudes, place minorities and women in competition with white men who before often had competed only among themselves.

[36] Griggs v. Duke Power Company is discussed in detail in Part B, "Civil Rights Law and the Problem."

[37] *See* text accompanying notes 71–80 in Part B.

[38] *See* United Steelworkers of America v. Weber, 443 U.S. 193 (1979), discussed in text accompanying notes 101–112 in Part B.

[39] Two experts on affirmative action plans have written: "We are concerned that incredible ignorance of the laws and regulations, overreactions, limited budget commitment, and poor management are creating 'mongrel' affirmative action and EEO programs and causing more harm than anticipated. We are appalled at what is going on in institution after institution, time and time again in the name of EEO and AAP." Pati and Reilly, "Reversing Discrimination," pp. 9–10.

[40] J.S. Pottinger, "The Drive Toward Equality" in *Reverse Discrimination*, ed. B.R. Gross (Buffalo: Prometheus Books, 1977), pp. 41–49.

[41] *See* Pati and Reilly, "Reversing Discrimination," p. 21.

[42] "Tokenism" as a way of avoiding changing formal and informal discriminatory organizational rules (see text accompanying notes 19–33 in Part A) rather than creating a climate encouraging the involvement of minorities and women in the life of the organization, is discussed in detail in R.M. Kanter, *Men and Women of the Corporation* (New York: Basic Books, 1977), pp. 206–44; R.M. Kanter, "Some Effects of Proportions on Group Life: Skewed Sex Ratios and Responses to Token Women," in *American Journal of Sociology* (1970), vol. 82 (1970), pp. 965–90.

[43] Thomas Sowell, "Affirmative Action Reconsidered," in *Reverse Discrimination*, ed. Barry R. Gross (Buffalo: Prometheus Books, 1977), pp. 113–32.

These plans jeopardize the relative advantages white men hold as a group because of their prior insulation from competition with minorities and women. Changes caused by affirmative action plans are more easily rationalized in accordance with existing prejudices portraying minorities and women as inferior and unqualified than with the nondiscriminatory attitudes the plans encourage.

Both critics and proponents of affirmative action acknowledge the difficulty of changing prejudiced attitudes. The arguments that affirmative action plans stigmatize minorities and women, however, use this difficulty to oppose affirmative action plans: there should be no affirmative action plans because their efforts to change discriminatory beliefs may exacerbate them. Such arguments only deserve attention when accompanied by concrete alternatives that overcome discrimination better than affirmative action plans. The Commission knows of no workable alternatives. Because of our understanding of the nature and extent of race, sex, and national origin discrimination, we are convinced that strict colorblind and gender-neutral approaches are foredoomed to failure.

Inept design and execution of affirmative action plans, of course, can "stigmatize" minorities and women. Affirmative action plans can feed perceptions of minority and female inferiority, for example, when they select unqualified or token minorities who are destined to fail, when they simply are statistical schemes for keeping litigators out of corporate treasuries, and when they do not restrain supervisors from acting on racist or sexist stereotypes. Faulty implementation of some plans, however, is no basis for labeling all affirmative action plans as stigmatizing. The appendix to this statement discusses at length how properly to create and carry out an effective affirmative action plan.

Affirmative action plans have been subject to abuse. If undertaken with little or no understanding of the nature of the problem they are designed to remedy, affirmative action plans can lead at best to mechanical compliance in a continuing climate of animosity among racial and ethnic groups and between men and women, and at worst to subversion of the plan itself.

"Group Entitlements"

Race, sex, and national origin statistics in affirmative action plans do not mean, as some have alleged, that certain "protected groups" are entitled to have their members represented in every area of society in a ratio proportional to their presence in society.[44] As this statement has repeated, numerical data showing results by race, sex, and national origin are quantitative warning signals that discrimination may exist. While highlighting the effects of actions, they cannot explain the qualitative acts, much less their motivation, that cause those effects. The Commission shares the frustration of Supreme Court Justice Thurgood Marshall, who set out similar distinctions in a dissenting opinion in a recent voting rights case:

> The plurality's response is that my approach amounts to nothing less than a constitutional requirement of proportional representation for groups. That assertion amounts to nothing more than a red herring: I explicitly reject the notion that the Constitution contains any such requirement. . . .[T]he distinction between a requirement of proportional representation and the discriminatory-effect test I espouse is by no means a difficult one, and it is hard for me to understand why the plurality insists on ignoring it.[45]

We reject the allegation that numerical aspects of affirmative action plans inevitably must work as a system of group entitlement that ignores individual abilities in order to apportion resources and opportunities like pieces of pie.

Individuals are discriminated against because they belong to groups, not because of their individual attributes. Consequently, the remedy for discrimination must respond to these "group wrongs." The issue is how. This statement has argued that when group wrongs pervade the social, political, economic, and ideological landscape, they become self-sustaining processes that only a special set of antidiscrimination techniques—affirmative action—can effectively dismantle. Such group wrongs simply overwhelm remedies that do not take group designations into account. Affirmative action is

[44] Those who stress this view range from the most vocal opponents of affirmative action to those who claim that they, too, should be covered. *See, e.g.*, Brief of American Jewish Committee, American Jewish Congress, Hellenic Bar Association of Illinois, Italian American Foundation, Polish American Affairs Council, Polish American Educators Association, Ukrainian Congress Committee of America (Chicago Division), and Unico National, Amici Curiae at 32–33, in Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

[45] City of Mobile, Alabama v. Bolden, 446 U.S. 55, 122 (1980) (Marshall, J. dissenting). The plurality opinion was written by Justice Stewart, who was joined by Chief Justice Burger and Justices Rehnquist and Powell.

necessary, therefore, when two conditions exist: when members of identifiable groups are experiencing discrimination because of their group membership *and* the nature and extent of such discrimination pose barriers to equal opportunity that have evolved into self-sustaining processes.

These are rational, factually ascertainable conditions, not arbitrary value judgments or unthinking entitlements to statistically measured group rights based on statistically measured group wrongs. The first condition exists when evidence shows that discrimination is occurring. The second condition is more difficult to determine, but it is still a factual matter. We suggest that discrimination has become a self-sustaining process requiring affirmative action plans to remedy it when the following four characteristics are present:

1. *A history of discrimination* has occurred against persons because of their membership in a group in the geographical and societal area in question;
2. *Prejudice* is evident in widespread attitudes and actions that currently disadvantage persons because of their group membership;
3. *Conditions of inequality* exist as indicated by statistical data in numerous areas of society for group members when compared to white men; and
4. *Antidiscrimination measures* that do not take race, sex, and national origin into account have proven ineffective in eliminating discriminatory barriers confronting group members.

These four categories of evidence focus on the time, depth, breadth, and/or intransigence of discrimination. Their presence demands that concern about discrimination extend beyond the more palpable forms of personal prejudice to those individual, organizational, and structural practices and policies that, although superficially neutral, will perpetuate discriminatory processes.[46]

The Federal Government, based on its experience in enforcing civil rights laws and administering Federal programs, collects and requires that others collect data on the following groups: American Indians, Alaskan Natives, Asian or Pacific Islanders, blacks, and Hispanics.[47] It is the Commission's belief that a systematic review of the individual, organizational, and structural attitudes and actions that members of these groups encounter would show that they generally experience discrimination as manifested in the four categories set forth above.

The conclusion that affirmative action is required to overcome the discrimination experienced by persons in certain groups does not in any way suggest that the kinds of discrimination suffered by others—particularly members of Euro-ethnic groups[48]—is more tolerable than that suffered by the groups noted above. The Commission firmly believes that active antidiscrimination efforts are needed to eliminate all forms of discrimination. The problem-remedy approach insists only that the remedy be tailored to the problem, not that the only

[46] The Small Business Administration (SBA), pursuant to congressional directive (15 U.S.C.A. §637(d)(3)(c) (Supp. 1981)), has developed a similar four-point test. In ascertaining whether a group has suffered chronic racial or ethnic prejudice or cultural bias, the SBA applies the following criteria: (1) if the group has suffered the effects of discriminatory practices or similar invidious circumstances over which its members have no control; (2) if the group has generally suffered from prejudice or bias; (3) if such conditions have resulted in economic deprivation for the group of the type that Congress has found exists for the groups named in Pub. L. No. 95-507; and (4) if such conditions have produced impediments in the business world for members of the group over which they have no control that are not common to all business people. 13 C.F.R. §124.1-1(c)(3)(iv)(B) (1981).
The test is used to determine whether members of a minority group, not specifically designated by Congress as socially disadvantaged, qualify for the section 8(a) program of the Small Business Act (15 U.S.C. §637(a) (Supp. 1981)). This program fosters business ownership by socially and economically disadvantaged persons. 13 C.F.R. §124.1(b) (1981). The groups specifically designated by Congress as socially disadvantaged are black Americans, Hispanic Americans, Native Americans, and Asian Pacific Americans. *See* 13 C.F.R. §124.1-1(c)(3)(ii) (1981), pursuant to 15 U.S.C.A. §637(d)(3)(c) (Supp. 1981).
For another four-point test to determine whether certain groups should be included in affirmative action plans, *see* Daniel C. Maguire, *A New American Justice: Ending the White Male Monopolies* (Garden City: Doubleday, 1980), pp. 129–68.

[47] Directive No. 15, Race and Ethnic Standards for Federal Statistics and Administrative Reporting, Statistical Policy Handbook, *reprinted in* 43 Fed. Reg. 19,269 (1978). The data collection, of course, also includes whites and women within each category. The directive is careful to note the following: "These classifications should not be interpreted as being scientific or anthropological in nature, nor should they be viewed as determinants of eligibility for participation in any Federal program."

[48] The term "Euro-ethnic American" is an umbrella term, including persons from the various and unique ethnic, religious, and nationality groups of Eastern and Southern Europe. In January 1981 the Commission issued a "Statement on the Civil Rights Issues of Euro-Ethnic Americans" based on a consultation on this subject matter held a year earlier. In that statement, the Commission observed that due to the lack of statistical data of all kinds on Euro-ethnics, it has not been possible to assess the extent of the discrimination they may be experiencing, much less its varied forms and dynamics. The Commission urged appropriate Federal agencies to explore ways of gathering appropriate employment data. The Commission currently is doing research on Euro-ethnics in its "Ethnicity in Employment Study."

remedy for discrimination is affirmative action to benefit certain groups.

Arguments against affirmative action have been raised under the banner of "reverse discrimination." To be sure, there have been incidents of arbitrary action against white men because of their race or sex.[49] But the charge of "reverse discrimination," in essence, equates efforts to dismantle the process of discrimination with that process itself. Such an equation is profoundly and fundamentally incorrect.

Affirmative action plans are not attempts to establish a system of superiority for minorities and women, as our historic and ongoing discriminatory processes too often have done for white men. Nor are measures that take race, sex, and national origin into account designed to stigmatize white men, as do the abusive stereotypes of minorities and women that stem from past discrimination and persist in the present. Affirmative action plans end when nondiscriminatory processes replace discriminatory ones. Without affirmative intervention, discriminatory processes may never end.

Properly designed and administered affirmative action plans can create a climate of equality that supports all efforts to break down the structural, organizational, and personal barriers that perpetuate injustice. They can be comprehensive plans that combat all manifestations of the complex process of discrimination. In such a climate, differences among racial and ethnic groups and between men and women become simply differences, not badges that connote domination or subordination, superiority or inferiority.

[49] See note 20 in Part B.

Statement by Commissioner Stephen Horn

"Affirmative action" is simply good personnel practice—long overdue. As with any concept, it can be misused.

So there is no mistake as to this Commissioner's views, I am opposed to quotas being applied in recruitment or advancement within a work force unless there has been a finding of intentional discrimination by a court of law or a legally constituted administrative body of the Federal or State government.

I am in favor of goals voluntarily arrived at which will provide that those recruited for and advanced in a particular work force will adequately reflect the qualified talent which exists in the relevant labor pool regardless of the race, sex, national origin, handicap, or age of the individual involved. I recognize that there is also an affirmative responsibility not only by the school systems and labor-management apprenticeship programs to provide a pool of candidates which reflects this diversity, but also by the employing organizations of our society—whether in business, labor, government, or nonprofit organizations—to train and work to upgrade individuals so that the work force will reflect such diversity.

Appendix

Guidelines for Effective Affirmative Action Plans

This appendix applies the problem-remedy approach set forth in the Commission's statement, Affirmative Action in the 1980s: Dismantling the Process of Discrimination, *to the design and implementation of affirmative action plans in employment. It demonstrates that recognizing how the process of employment discrimination operates is the critical first step in designing effective affirmative action plans. It provides general affirmative action planning guidelines that assume a genuine commitment to affirmative action as a strategy for organizations to eliminate discrimination. This appendix draws extensively from the proceedings of the Commission's consultation on its proposed statement,* Affirmative Action in the 1980s: Dismantling the Process of Discrimination, *held on March 11, 1981. Papers presented at the consultation as well as additional sources are cited in the bibliography attached to this appendix.*

Affirmative action plans are systematic efforts to implement equal employment opportunity policies by identifying and remedying race, sex, and national origin discrimination. Affirmative action plans are not isolated and sporadic remedial steps; they are deliberate organizational strategies for interrupting discriminatory processes and creating self-sustaining, nondiscriminatory processes.

An effective affirmative action plan has the support of the organization's top leaders, who commit the organization to the objective of equal employment opportunity. The plan first diagnoses those aspects of "business as usual" that erect discriminatory barriers to minorities and women. The plan examines both the numerical employment profile of the organization and the organizational policies and practices that produce the numerical profile. Guided by an understanding of the subtle and overt forms of discrimination within the organization, top managers instruct appropriate personnel to design and implement the affirmative action plan. The affirmative action plan establishes nondiscriminatory values and procedures and sets goals, accompanied by realistic timetables that measure progress under the plan. Having demonstrated an initial commitment to the affirmative action program, organizational leaders allocate adequate resources for these tasks and demonstrate continuing support for the plan by using their power to grant or withhold organizational rewards for effective implementation.

Affirmative action plans do not confine their efforts to identifying and "making whole" specific individual victims of discrimination; rather, they identify and

change those discriminatory organizational practices and conditions that produce victims in the first place. Affirmative action plans are comprehensive instead of *ad hoc*. They combine an understanding of the discriminatory process, knowledge of the history, structure, dynamics, and even the "personality" of organizations, and strategies for effecting organizational change. They are not pat formulas that can be mechanically applied. They require the same skill, sensitivity, and creativity that go into any plan for introducing new organizational policies.

Because each organization is different, the specific patterns and dynamics of discrimination are different for each. Similarly, the repertoire of antidiscrimination techniques is as varied as the forms of discrimination. Although the techniques that would work most effectively differ from organization to organization, some basic principles remain the same.

Essential to the successful implementation of an affirmative action plan are:

1. Commitment of top leadership to create and carry out the affirmative action plan;
2. Extensive and accurate analysis of the organization's discriminatory problems;
3. Participation by all groups affected by the plan in identifying discriminatory problems and their remedies;
4. Comprehensive and well-integrated techniques and procedures for promoting equal employment opportunity throughout the organization;
5. Commitment of organizational leadership to overcome unforseen difficulties and organizational resistance; and
6. Means for defining and continually evaluating the effectiveness of the plan.

These general elements of affirmative action plans are directed specifically to reorienting organizational policies and practices away from discrimination and toward true equal opportunity.

Top Leadership Support

- **Top leadership uses its authority and organizational resources to support change.**
- **Top leadership is visibly and personally involved in designing, implementing, monitoring, and evaluating the affirmative action plan.**
- **Top leadership uses and supports qualified technical affirmative action experts in effecting organizational change.**

Affirmative action plans cannot produce thorough and lasting change without the support of top leaders of the organization. The reasons for such support may vary, and the consequences of these varying motivations may prove decisive. But whether that support comes from a sense of fair play, community pressure, the fear of litigation, or an understanding that discrimination saps productivity and reduces available human resources, the active and visible participation by top management and labor leadership in their organization's affirmative action plan is crucial. Their actions greatly influence the spirit and enthusiasm with which their organization implements the plan.

Management and labor leaders can tangibly express their commitment to the affirmative action plan by personally announcing, expressing support for, and participating in its implementation. They can establish themselves as positive role models. Chief executives can make their commitment known through newsletters, appearances at organizational meetings, and pressure on second-level executives. Underscoring their announced support, leaders can provide clear incentives for integrating equal employment opportunity policies into the practices of all levels of

management. *They can explicitly link successful implementation of the affirmative action plan with organizational rewards, such as promotion and merit-pay increases, and penalize actions that obstruct the plan.*

Organizational leaders commonly delegate major responsibilities to equal employment opportunity (EEO) or affirmative action officers. Their task is not to implement the plan, but to assist the organization in creating the plan and then integrating it into the daily routine of the organization's officals. The organizational position and leadership roles of these key personnel are often subject to conflict and limitation. EEO officers may be seen by management as advocates for minorities and women, seen by minorities and women as representatives of management, and treated accordingly by each. In addition, all parties may perceive affirmative action personnel as advocates of the interests of one group over those of others. Affirmative action officers may be isolated from real decisionmaking power if they lack adequate access to top management. The resulting absence of authority can render impossible their already difficult mission. Another frequent problem occurs when top management does not view affirmative action officers as appropriate candidates for other important organizational positions. When chief executives overlook the skills of affirmative action officers, their positions become dead end jobs. Their lack of executive support and opportunity for professional mobility within the organization can undermine their commitment as well as their effectiveness. When affirmative action officers are placed in such isolated, no-win positions, the success of the entire program is jeopardized.

One way to assure that the organization takes equal employment efforts seriously and that affirmative action personnel have sufficient authority and motivation is to place promising line personnel temporarily into the staff position of affirmative action officer. In other cases, successful affirmative action officers may be rewarded by being placed in new positions with line responsibilities. Such appointments communicate to the organization that successful implementation is linked to organizational advancement.

Because the tools of management that are most effective in combatting discrimination are the same as those used in instituting new organizational policies in general, affirmative action officers should be well-schooled in organizational dynamics. All too often, affirmative action officers begin their work with little training or experience in management. Top leadership must carefully plan the training, functions, and position of affirmative action personnel. They must also commit the necessary support, access, and financial resources that go into any serious effort to implement new organizational policies.

Replacing discriminatory processes with nondiscriminatory ones is a long-term endeavor. Top leadership must pursue with patience the goal of making equal employment opportunity an accepted and integrated aspect of organizational practice.

Organizational Self-Analysis

- **Perform quantitative organizational diagnosis.**
- **Perform qualitative organizational diagnosis.**
- **Identify policies, procedures, and formal and informal processes that have discriminatory effects.**
- **Identify the effect of the external environment on organizational practices and internal climate.**
- **Identify the effect of the internal climate of the organization on minorities and women.**

Thorough and specific organizational self-analysis leads to thorough and specific affirmative action plans. Although effective remedies can result from trial, error, and managerial instinct, a clear diagnosis of problems is more likely to underlie an effective affirmative action plan.

Organizational self-analysis focuses on personnel decisions. It is these decisions that cause and perpetuate discrimination. Self-analysis gets to the human level by seeking to find out what it is actually like to be a part of the organization. It reviews the effect on minorities and women of such aspects of organizational procedure as: *recruitment* of potential employees; *selection* criteria in hiring (e.g., educational or experiential qualifications, application forms, interview procedures, testing); *promotion and transfer* procedures (e.g., career pathways, "fast tracking," seniority, training opportunities); *wage and salary* structure; *employment benefits; layoff procedures;* and *disciplinary and grievance* procedures. Most important in reviewing these factors is an understanding of the many ways, both intentional and unintentional, in which discrimination operates.

Part A of the Commission's statement on affirmative action, *Affirmative Action in the 1980s: Dismantling the Process of Discrimination,* discusses at length how discrimination against minorities and women works. It describes race, sex, and national origin discrimination as self-sustaining processes of individual, organizational, and structural predispositions and policies that derive from past discrimination and perpetuate that discrimination, even unintentionally, into the present and, if unchecked, into the future. These processes are so deeply ingrained in the everyday actions of most organizations that it requires deliberate antidiscrimination strategies that take race, sex, and national origin into account to break this cycle of discrimination. But as the Commission emphasizes in the statement, more is required of such interventions than the mechanical creation of a new numerical balance. Attention to those processes within the organization that produce numerical results is crucial.

The literature on affirmative action plans is replete with numerical measures of work force composition. These quantitative techniques for describing and predicting female and minority employment patterns are essential to determine whether and where discrimination may be occurring. These analyses can go beyond comparing by occupational categories the percentages of minorities and women in the organization with their percentages in the relevant available labor pool. They can include statistical techniques that describe, in terms of race, sex, and national origin, such variables as the rapidity of promotions, the frequency and size of merit increases, the numbers and types of employees supervised, and wage rates. Such techniques are, however, insufficient by themselves. Numerical inequalities are the best signal that discrimination may be occurring; they do not identify the interrelated and sometimes subtle discriminatory processes that produce them.

To identify discriminatory processes accurately, organizational self-analysis requires both numerical (quantitative) and nonnumerical (qualitative) approaches. Describing and measuring the actual everyday beliefs and behaviors that produce disparate hiring and promotion rates is as important as examining the rates themselves.

The kinds of activities that contribute to an organization's statistical employment profile include: the formal practices and policies of the organization, the informal policies and practices of the organization, the external environment in which the organization exists, and the internal "climate" of the organization, which is largely the product of the three preceeding factors.

The Formal Rules

The formal rules and policies of the organization are the officially approved procedures of organizational life. They include the formal, hierarchical structure—the official chain of authority and responsibility—and the rules for making organizational decisions. There are many examples of the ways in which formal organizational rules have discriminated in the past. Today, however, explicit organizational rules that intentionally discriminate are rare. Today's discrimination is more frequently perpetuated by rules that are fair in form, but biased in effect. This situation requires sensitivity to rules that are superficially neutral, but nonetheless discriminatory. One example of such a rule is a hiring standard that requires certain amounts of education or experience to qualify for hiring or promotion. When such education or experience does not predict job success, and when disproportionately few minorities or women have such backgrounds, the rule discriminates without the compensating virtue of accurate performance prediction. Similarly, rules "protecting" women against the rigors of manual labor may bear no relationship to women's actual capabilities or to the actual requirements of the job.

By examining formal aspects of organizational decisionmaking that may be fair in form but that discriminate against minorities or women, the organization can set about instituting new, more rational, and nondiscriminatory policies.

The Informal Rules

The informal structures, rules, and procedures of organizations are sometimes more important than the formal ones in understanding discrimination. The informal rules and policies are unarticulated aspects of organizational life. They are not part of the organization's official decisionmaking structure, but are the informal practices that determine whether and how the formal rules are to be implemented. For example, an organization may have a carefully devised affirmative action plan that seeks to include minorities and women at all levels and in all jobs, while informal rules within the organization bar minorities from sales positions and women from outdoor work. Another organization may formally espouse a policy of aggressive recruitment of minorities and women at universities, while informally recruiters who are friends or former students of white male faculty may rely excessively upon the "old boy network" in their recruiting. Consequently, they may, even unintentionally, favor the white male proteges of their recruitment sources. Similarly, within the organization, white male managers may pass over minority or female subordinates while identifying young white male subordinates as candidates for the "fast track" within the organization. The fact that these white male candidates superficially conform more closely to the images of organizational leaders (who traditionally have been almost exclusively white men) disadvantages equally talented women and minorities.

Because such rules are informal and perhaps contradict the organization's official policy, they may be difficult to identify. Nonetheless, their importance should not be underestimated in analyzing a problem of discrimination.

The External Environment

Another factor that exerts considerable influence on an organization's affirmative action plan is the environment in which the organization exists. The best intended efforts to implement affirmative action plans can fail when structural discrimination in the external environment of the organization creates barriers to equal opportunity. Structural discrimination consists of the cumulative effect of those seemingly neutral aspects of everyday life, such as housing, education, and

employment, that perpetuate past discrimination into the present and future. These external structural factors influence the labor market and, consequently, the organization's statistical employment profile, which may arouse suspicions of illegal discrimination.

Discriminatory conditions in such external sectors as housing and education may influence the implementation of affirmative action plans. For example, organizations located far from residential areas with high minority concentrations and without access to public transportation may receive fewer minority job applicants than organizational leaders or affirmative action staff might hope for. Although the organization may not be responsible for housing segregation or for the lack of public transportation, it will speed the implementation of its affirmative action plan by taking steps to remedy these problems. For example, transportation facilities such as carpools or vanpools can be arranged for employees unable to get to work by other means. Wherever possible such transportation arrangements should include employees from different neighborhoods. In this way the organization can encourage a climate that supports diversity.

Structural discrimination may hamper an organization's affirmative action plan when inadequate day care facilities prevent single parents, most often women, from seeking or maintaining employment. In such cases, the organization may address this problem by establishing onsite day care centers as part of an affirmative action plan.

Structural discrimination also may negatively influence the organization's internal climate. As much as they might like to, employees cannot leave the external environment behind when they enter the worksite. Employees bring with them the values and norms of the communities in which they live, and these values and norms in turn affect those of the organization. Top management must recognize that a successful affirmative action plan means the creation of a more culturally diverse work force than previously existed in most organizations. Learning to manage a more diverse work force becomes a task for management intent on improving the likelihood that an affirmative action plan will succeed.

Another factor in the external environment is the character of the signals emanating from government institutions and officials with respect to the importance of creating and effectively implementing comprehensive affirmative action plans. Such signals may change with the political tides and are poor guides for organizational decisionmaking. An organization that is truly committed to ending discrimination and increasing available human resources recognizes that an effective affirmative action plan is ultimately a matter of substituting rational and merit-based decisionmaking for biased and irrational processes that perpetuate discrimination. When an affirmative action plan is seen by top management as a method for improving the workplace environment for all employees, its justification becomes an internal matter of organizational self-interest.

The Organizational Climate

The organizational climate is the product of all those everyday policies and practices that create the internal psychology of an organization. It is influenced by the personalities of members of the organization, the formal and informal rules that make up the organization, and the external environment in which the organization operates. It consists of those factors within the organization that contribute to employee morale and job satisfaction as well as the ways tension and conflict are resolved within the organization. In sum, the organizational climate reflects "what it is like" to work in that organization. An organizational climate that is

unfavorable to minorities and women will hinder an affirmative action plan, regardless of any formal commitment top management may express.

One major source of an unfavorable organizational climate for minorities and women is tokenism, the hiring of a small number of highly visible minorities or females as a concession to equal opportunity pressures. Tokenism communicates to white and male employees that the affirmative action plan is not a serious organizational commitment. Tokenism isolates minority and female employees, presenting them as showpieces who lack any real organizational credibility. Such a "fishbowl" existence often leads to such negative results as high rates of absenteeism and job turnover.

This is not meant to imply that if minorities and women cannot be hired in sufficiently large numbers to avoid the appearance of tokenism, they should not be hired at all. Affirmative action plans have to begin somewhere. Hiring small numbers of minorities and women in the initial stages of implementing an affirmative action plan can advance an organization's affirmative action objectives when these minorities and women are treated as competent and valued employees. Tokenism, after all, is a matter of organizational attitudes and actions as well as numbers. To create a nondiscriminatory environment, however, the organization should be committed to hiring enough minorities and women to influence and maintain the gains made through the affirmative action plan.

Other aspects of the organizational climate that may impede an affirmative action plan's success are organizational resistance and white and male backlash, both discussed below.

Minority and Female Participation

- **Solicit ideas from all personnel, especially minorities and women.**
- **Act upon minority and female suggestions.**
- **Give reasons if minority and female suggestions are not acted upon.**

Another task of organizational leadership is to encourage minority and female participation in affirmative action planning. Minorities and women already employed are the best authorities on what it is like to be a minority or a woman within that organization. As such, they are most likely to be able to identify the policies and practices that are discriminatory.

Organizational leaders should solicit the participation of minorities and women, as well as white male employees, at all levels of the organization. By working closely with such employees, organizational leaders can identify and responsibly address issues of organizational racism and sexism. When properly conducted, such activities can reduce stereotyping by all concerned. They can also promote more effective use of minorities and women in other organizational tasks by giving minorities and women greater opportunities to demonstrate competence and initiative within the organization. Most significantly, these activities help target the affirmative action plan to the specific forms of discrimination that minorities and women in the organization experience. An affirmative action plan that lacks the support of minority and female employees cannot take root.

Organizational leaders should solicit employee viewpoints in ways that inspire confidence. Employees must know that they will not be penalized for voicing their opinions, perceptions, and needs, even when these may be at odds with those of top management. Many organizations have used anonymous questionnaires in gathering such information. Other organizations have hired outside consultants to conduct confidential interviews or have encouraged the creation of minority and female task forces and advocacy groups within the organization. The methods vary

from organization to organization. Which method works best depends on the specific characteristics of the organization.

Regardless of which method they use, organizational leaders must take seriously the information and advice employees offer. When appropriate, the organization should respond to employee suggestions. If suggestions are not acted upon, the reasons should be clearly stated. Unresponsiveness creates resentment and a sense of betrayal among employees.

Participation by employees in the early stages of affirmative action planning gives them a stake in the plan's success. The resulting interest of minority and female employees in the plan is especially important. Their support can foster informal activities, such as urging their friends to seek employment with the organization and encouraging them to stay. These activities are important byproducts of an effective affirmative action plan.

Techniques for Promoting Change

- **Determine specific points of intervention.**
- **Develop remedies.**
- **Assign priority to remedying each problem.**
- **Allocate necessary resources for implementing remedies.**
- **Implement program.**

An effective affirmative action plan is a long-term process like the process of discrimination it remedies. Affirmative action plans differ from organization to organization in order to provide the proper remedies for unique organizational problems. Nevertheless, some general areas in which discrimination frequently occurs can be identified, and the possible remedies then often become self-evident.

Examining the validity of hiring standards, for example, is an early step in diagnosing discrimination. Affirmative action plans remedy non-job-related and discriminatory standards by devising ones that more accurately reflect the requirements for successful performance. Of course, the specific details of each existing hiring standard and the specific details of the appropriate remedy will vary from organization to organization. Organizational self-analysis identifies those aspects of the organization's operations that should be changed and helps top management determine which remedies can be applied most easily and effectively. For these reasons, an affirmative action plan is not a magic wand to be waved over an amorphous and ill-defined problem, nor is it a list of step-by-step techniques to be rigidly applied across the board. Instead, an affirmative action plan is a dynamic intervention program that aims to replace self-sustaining discriminatory processes with nondiscriminatory ones. A primary technique for change, therefore, is a comprehensive analysis of behaviors that lead to underrepresentation.

An organization that wishes to promote more women to positions of organizational authority, for example, must determine what has prevented women from holding such positions in the past. In all likelihood a combination of factors, including disparate recruitment, selection, and promotion procedures, is responsible. Some of these factors may have greater influence than others, however, and self-analysis can determine their relative weights as well as help refine the types of remedies that may apply. For example, an organization which determines that adequate efforts have not been made to recruit women with the potential to fill high organizational positions can devote more resources to recruiting at women's colleges or through women's organizations. A different organization may determine that women do not apply for promotion because they do not learn of openings. In such a case, open posting of available jobs may help attract female

applicants. In another organization, supervisors in predominantly female areas may be asked to nominate promising employees for promotion. In yet another organization, selection criteria may be redefined to give credit for relevant skills that employees develop outside the usual promotion pathways.

Although crucial, organizational self-analysis should not be a substitute for action. Some discriminatory problems may not be easily discovered, and an obsessive search for ever more finely detailed diagnosis may prove counterproductive. In such instances, trial and error may be the best technique for determining remedies. Most of the time, however, a sophisticated organizational self-analysis can reduce the expense and frustration that go along with insufficiently focused remedies.

In undertaking an affirmative action plan, employment statistics often provide the first clues as to whether and where discrimination may be occurring. High turnover of minorities and women in certain departments, for example, will alert affirmative action personnel and organizational leaders that a problem may exist in that department. Qualitative analysis may then determine whether such a problem exists and identify its specific nature. In one department, for example, high minority and female turnover may be caused by informal organizational practices, such as the exchange of inside information and the development of social relationships at luncheons or over cocktails, activities from which minorities and women may be excluded. In other departments, high minority and female turnover may be due to an organizational climate that is openly hostile to them. Managers and other employees may behave in an overtly racist or sexist manner, and minorities and females may prefer to leave the department or the organization rather than continue working under such conditions.

Clearly, the nature and extent of the problem will determine the nature and extent of the remedy. In the first case, where high minority and female turnover results from unintentionally exclusionary behavior, efforts can be made to include minorities and women in the informal information-sharing networks in which whites and males participate. In another case, it may be appropriate to encourage the creation of new formal, nonexclusionary networks. By sponsoring training sessions geared toward helping employees understand the subtle and perhaps unintentional ways in which discriminatory processes can operate, organizational leaders can underscore the expectation that qualified minorities and females will advance. Other training programs focusing on such issues as managing a diverse work force, conflict management, or communications skills may be necessary in other situations. In cases where high minority and female turnover is due to overt racial prejudice or sexism, the proper remedial technique may be race-relations training or the transfer or dismissal of prejudiced managers.

Although training programs have often proved useful, they should not substitute for necessary policy changes. The content of training programs should relate directly to organizational problems. Training should also include mechanisms and techniques for applying in the organization what is learned in the classroom. Furthermore, top management should support the application of these mechanisms and techniques. Even the best and most appropriate training programs are useless if there is no opportunity or support for applying what is learned. In other instances, problems of organizational discrimination are such that training programs are inappropriate, and in such cases more sophisticated organizational or job analysis may be required.

In one organization, for example, an analysis of the organizational factors that contributed to high turnover among recently hired female sales personnel led

management to recognize that what they had thought was a problem of sexism among their customers was in reality an organizational problem. Management concluded that such practices as assigning female sales personnel to pursue competitors' clients, under the assumption that there would be nothing lost if the women failed, actually had the effect of assigning them to the most difficult potential clients while granting the most potentially successful clients to male sales personnel. Obviously, the organizational climate was not one in which female sales personnel enjoyed the same on-the-job opportunities as their male colleagues. This analysis paved the way for specific programs to increase female participation in the sales force and remove the causes for their high turnover rates. In addition, it led to a broader understanding of what went into sales work in that organization than had previously been recognized. The new information was put to use not only to retain saleswomen, but to develop more specific notions about how to train and deploy all potential salespeople in the future. Rather than applying rigid remedies without sensitivity to the subtleties of the discriminatory problem, this sophisticated self-analysis provided remedies tailored to the unique organizational problems that existed.

Overcoming Organizational Resistance and Other Difficulties

- **Identify the kinds of resistance.**
- **Identify and implement actions aimed at overcoming resistance.**
- **Identify and implement actions aimed at preventing future resistance.**
- **Maintain and improve the affirmative action plan despite economic setbacks.**

Efforts to institute new organizational policies inevitably face resistance of one kind or another. Developing new decisionmaking patterns and implementing new policies means giving up old ones that have become habitual and are seen as the normal way of doing things. The axiom that change never comes easily is especially true with regard to affirmative action plans.

The types of resistance to affirmative action plans are many and complex. They can range from organizational inertia and rigidity to deliberate sabotage and white and male backlash. In some organizations, resistance to affirmative action plans may take such forms as tokenism or efforts to "contain" the progress of minorities and women within limits acceptable to whites and men. In other organizations, resistance may take different forms, such as deliberately sabotaging or denying credit for work done by minority or female employees. Another symptom of resistance to affirmative action plans is the organizational isolation of affirmative action officers. Failing to provide affirmative action officers with enough financial, personnel, and training support services also may be expressions of organizational resistance to affirmative action plans.

Just as the symptoms of organizational resistance vary, the sources of such resistance vary as well. For example, because affirmative action plans often are designed at company headquarters, regional personnel may feel excluded from the planning process and may be uncertain about the company's commitment to affirmative action. This combination of resentment and uncertainty frequently leads to resistance on the part of regional managers. An affirmative action plan that is likely to succeed must take potential sources of resistance into account and must cope with them as early in the planning process as possible.

As is the case when seeking to identify the processes of organizational discrimination, the point in looking at resistance to affirmative action plans is not to find blameworthy parties to punish, but to gather the kind of sophisticated and comprehensive information necessary to promote successful change. Recognizing

that resistance accompanies any major change in organizational policies, and being alert to the forms that resistance to affirmative action plans may take, can help organizational leaders and affirmative action personnel plan more effectively. Such an understanding also can help organizational leaders avoid interpreting resistance as failure and abandoning affirmative action plans before implementing them effectively.

One example of resistance that sabotaged an affirmative action program occurred in a municipal police department, which successfully recruited minority cadets only to see all of them fail or drop out of the training academy. Recruiting inadequately prepared candidates, or allowing discrimination in the training process, may both be signs of resistance. When such experiences are used as evidence that an affirmative action plan cannot succeed and to justify abandoning affirmative action efforts, then resistance has led to defeat. Organizations that recognize the likelihood of resistance and are prepared to allocate sufficient time, energy, and resources to overcome it are likely to avoid its negative consequences and be effective in combatting discrimination.

Just as internal resistance often impedes affirmative action plans, forces outside the organization may at times slow progress. Even the best designed and most comprehensive affirmative action plans are not immune from economic setbacks. Such setbacks may influence hiring, promotion, and the overall speed with which minorities and women can be integrated into the organization. Organizations can take various actions that will prevent economic setbacks from reversing past gains in employing minorities and women. Rather than lay off minority or female workers, who tend to have the least seniority because of past exclusion, organizations can devise parallel seniority lists solely for layoff purposes, reduce the workweek for all employees, encourage the early retirement of senior white male workers, or use other such devices to assure that minorities and women are not disproportionately affected.

Regardless of whether these alternatives are pursued, reductions in new opportunities do not justify abandoning affirmative action plans, which address the overall organizational climates as well as the statistical profiles of organizations. Moreover, organizations are always in flux. People are continually being hired and promoted, even during hard times. Despite their small numbers, minorities and women can thrive in an organization determined to create a climate of equality. Although an organization's affirmative action plans will be affected by and must respond to changes in the economic environment, economic reversals must not be allowed to serve as vehicles for organizational resistance to the effective implementation of affirmative action plans.

Means for Evaluating Progress

- **Use objective statistical measures.**
- **Use qualitative measures of organizational "climate" and behavior.**
- **Continually monitor progress of affirmative action interventions.**
- **Take appropriate action to respond to unforeseen events.**

A comprehensive affirmative action plan, growing out of a specific and detailed organizational self-analysis and the active support of organizational leaders, should have built-in indicators for judging success. Some of these indicators involve the qualitative aspects of an organizational climate that are often subtle and sometimes difficult to measure. Others lend themselves more readily to quantitative expression and evaluation.

Among the more easily measured organizational changes that suggest an affirmative action plan is successful are: increased number of minority and female job applicants, increased hiring and promotion of minority and female employees, long-term retention and advancement of minority and female employees, and long-term gains in organizational productivity.

The relatively clear-cut nature of statistical measures of work force composition and performance make them attractive as outcome criteria. But quantitative measures, although essential, are only part of the effort to evaluate the progress of affirmative action plans. Of equal importance are qualitative measures, such as frequent "soundings" of employee morale and other aspects of organizational climate. Through surveys, interviews, and other qualitative measures, the experiences of minorities and women as well as those of white male employees can be monitored continually. Numerical measures showing more equal outcomes are signs that discriminatory processes are being eliminated, but such measures do not identify or describe the workings of the new nondiscriminatory processes. Qualitative analyses are needed to determine whether new nondiscriminatory processes have been established that will continue as a routine part of the life of the organization when the affirmative action plan is withdrawn.

Affirmative action is a way of implementing national equal employment opportunity policy. It is a long-term process that has barely begun. The problem that affirmative action plans are designed to remedy has taken centuries to develop and resists quick and mechanical solutions. For women and minorities to be fully accepted in all jobs at all organizational levels, most organizations will need affirmative action plans designed to include minorities and women in sufficient numbers and with sufficient organizational backing so that a discriminatory organizational climate becomes nondiscriminatory. Only when such a climate has been established will a self-perpetuating process of equality take the place of the process of discrimination and bring to an end the need for affirmative action plans as we now know them.

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